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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-277

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner

versus

BOYD PETERS, ET AL.
Respondents

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Fifth Circuit

JAMES POPE SIMPSON
1507 Pacific Avenue — Room 900
Dallas, Texas 75201

Attorney for Petitioner
Missouri Pacific Railroad Co.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. .....

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner

versus

BOYD PETERS, ET AL.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, Missouri Pacific Railroad Company, prays that a writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the Fifth Circuit in the above case.

The writ should issue primarily because the Court of Appeals has held, in effect, that Title VII of the Civil Rights Act of 1964 makes agreements by Negroes unenforceable. Other subsidiary issues are raised, but they lead inevitably to this one; and Judge Godbold, on oral argument on May 9, 1972, brought the case into focus on this point, when he asked the Plaintiffs' counsel

"Is there any way that this agreement could have been made so as to be valid?"

After a long pause, Plaintiffs' counsel answered "No."

The decision of the Court of Appeals conflicts with ap-

plicable decisions of this Court; and, if they are not clearly in conflict, then the decision of the Court of Appeals involves important questions of federal law which should be settled by this Court.

OPINIONS BELOW

The first opinion of the Court of Appeals (See Pages A-17 to A-36) was dated April 10, 1973, and has been reported at 5 F. E. P. Cases 853 and 5 E. P. D., Sec. 8550, but has not been reported in the Federal Reporter. The second opinion of the Court of Appeals (Pages A-37 to A-43) was dated June 27, 1973, and has not been reported.

The findings of fact and conclusions of law by the District Court at the conclusion of the first trial (Pages A-44 to A-54) were dated February 17, 1970, and were reported at 2 F. E. P. Cases 442, and 2 E. P. D., Sec. 10, 180; and those at the conclusion of the second trial (Pages A-54 to A-60) were dated February 17, 1971, and were reported at 3 F. E. P. Cases 792, and 3 E. P. D., Sec. 8274; but they were not reported in the Federal Supplement.

JURISDICTION

The judgment of the Court of Appeals (Page A-16) was entered on April 10, 1973. A timely petition for rehearing was denied on June 27, 1973. (Page A-43). The jurisdiction of this Court is invoked pursuant to 28 USC Sec. 1254 (1).

QUESTIONS PRESENTED

1. Does Title VII of the 1964 Civil Rights Act impair the freedom of contract given to Negroes by the 1866 Act, by making their contracts unenforceable unless they conform, in purpose, terms, and effect, to the contracts made by whites.

2. In this case a collective bargaining unit, whose members were all black and were represented by an all-black union, made a collective bargaining agreement, which was lawful under the Railway Labor Act, and which embodied all of their rates of pay, rules and working conditions. In these circumstances —

A. Could their employer be guilty of an act of discrimination against an individual member of the unit be-

cause of his race, within the meaning of 42 US Code Sec. 2000e-2(a) (1), by faithfully carrying out the terms of the agreement?

B. If so, can the issue of discrimination be properly confined to differences between that agreement and others in respect to only one term, that is, the age for compulsory retirement, without taking into consideration other differences in terms which produced opposite effects?

C. If so, does the fact that most of the employer's white fireeman had a prescribed retirement age of 70, while this all-black unit had a retirement age of 65, suffice to establish such discrimination, even though there was an all-white bargaining unit of firemen which also had a retirement age of ~~70~~? 65 ? JRS

D. Does it make any difference that in fact most of the white firemen ceased to work as firemen before becoming 65, because of a promotion rule which the black firemen refused to accept?

3. After this all-black bargaining unit had collectively obtained the advantage of a unique arrangement permitting them, because they were black, to remain in service as firemen without penalty, instead of becoming engineers, and after they had collectively proposed and negotiated a rule to partially offset the effect of that arrangement by a unique compulsory retirement requirement, can the individual members use Title VII of the 1964 Civil Rights Act to evade the requirement that they retire at 65?

STATUTES INVOLVED

There are two statutes which the Petitioner Railroad believes authorized and required what was done in this case.

One is the Railway Labor Act, which required it to bargain collectively with its employees through representatives chosen by them and required all concerned to maintain their collective bargaining agreements. It was enacted June 21, 1934, and may be found at c. 691, 48 Stat. 1185 et seq. It is codified as 45 USC Sec. 151a et seq. Pertinent portions of the text appear at Pages A-7 to A-15 in the Appendix.

The other was the Civil Rights Act of 1866, which gave all persons the same right to make and enforce contracts as white citizens have, and made them subject to like pains and penalties. This was first enacted on April 6, 1866, and may be found at c. 31, Sec. 1, 14 Stat. 27. It was re-enacted on May 31, 1870, as c. 114, Sec. 18, 16 Stat. 140. It was codified in 1874 as Title 24, Sec. 1977. and it is presently codified as 42 USC Sec. 1981. Pertinent portions of the text appear at Page A-1.

However, the Courts below have held, in effect, that the rights and obligations created by those statutes were significantly impaired by Title VII of the Civil Rights Act of 1964, which forbids an employer to discriminate against an individual with respect to the conditions of his employment. This statute was enacted on July 2, 1964, as a part of Public Law 88-352, to take effect one year later, and it may be found at 78 Stat. 253 **et seq.** It is codified as 42 USC Sec. 2000e, and pertinent portions of it appear at Page A-1 to A-7.

STATEMENT

The Plaintiffs are six Negro men who were formerly employed by the Petitioner Railroad as locomotive firemen. They were retired after attaining the age of 65, because the collective bargaining agreement under which they were working, required that all members of that barga'ning unit retire at age 65. The Railroad had some white firemen who were working in a bargaining unit which also had a retirement age of 65, but most of its white firemen were in units whose retirement age was 70.

The Courts below based jurisdiction of the case on 42 USC Sec. 2000e-5(f). They ruled, in effect, that the Railroad intentionally engaged in an unlawful employment practice, in violation of 42 USC Sec. 2000e-2(a), by retiring the Plaintiffs before they reached the age of 70; and their orders would require the Railroad to repay the Plaintiffs for their total wage loss up to age 70, without deduction for their retirement pay, and to pay the costs of suit and the fees of the Plaintiffs' attorneys.

The Plaintiffs were originally employed as locomotive firemen on three small railroads, which never hired a

white man as a fireman, and did not hire any firemen after 1954. These black firemen constituted a separate craft and collective bargaining unit; and they were represented for collective bargaining by an all-black union, which was called the International Association of Railway Employees, and is hereinafter referred to as the I.A.R.E. These black firemen had a collective bargaining agreement with their employer, and by that agreement a seniority system was established covering the work of firemen on the territory on which they worked. However, these men did not work as hostlers or hostler helpers, as many firemen did, and their bargaining unit and agreement did not cover those jobs. The Petitioner, and the railroads by which the plaintiffs were employed, were in bankruptcy and under control of the bankruptcy court at St. Louis from 1933 to 1956.

In 1956, as a result of a corporate merger, these black firemen became employees of the petitioner, Missouri Pacific Railroad Company; but this did not alter the territory on which they worked, nor the identity of their representative for collective bargaining, nor their rates of pay, rules or working conditions as embodied in collective bargaining agreements, nor the seniority system which they had created. By 1956, conversion from steam power to diesel electric power had been substantially completed, with the result that the need for firemen in the railroad industry had been substantially curtailed. At the time these black firemen became employees of this Railroad, in 1956, there were already many more firemen in this bargaining unit than there were jobs for them to work on; and this Petitioner, the Missouri Pacific Railroad company, never hired any firemen, black or white, on the territory to which the Plaintiffs' seniority applied.

In the railroad industry there was traditionally a close relationship and ebb and flow between the jobs of firemen and engineer. As Chief Justice Burger said (before he became such) "the Engineers trained and taught the Firemen so that they could qualify for engineer jobs when available.[1] The arrangements for examining firemen, and promoting them to engineer, on a regular basis, and for

[1] *BLF&E v. National Mediation Board,* 410 F 2d 1025 at 1035 (D. C. Cir., 1969), Cer. Den. (1969) 396 US 878.

using the men alternately as engineers and firemen, were established on a nationwide basis by an agreement made in 1913 between the Brotherhood of Locomotive Engineers (hereinafter called BLE), which represented most of the engineers in the country, and the Brotherhood of Locomotive Firemen and Enginemen (hereinafter called BLF&E), which represented most of the firemen. These arrangements were incorporated into the various railroads' collective bargaining agreement while the railroads were under federal control during and after World War I; and since then they have been the subject of a vast amount of litigation which describes and explains them.[2]

However, prior to about 1964, neither the BLE nor the BLF&E admitted Negroes to membership. Whenever the BLF&E represented blacks, they seemed inclined to favor their members and take action which was hostile to the interest of the blacks and it was still an established fact in 1951 that no Negro had ever been employed as locomotive engineer.[3]

The result of those arrangements and that system were that, after a few years, most white firemen would stop working as firemen, because they would be working regularly as engineers. However, on the railroads in the Southeast, black firemen continued in service as firemen until they died or retired. This produced, on the railroads in the Southeast, an accumulation of black firemen, which created a problem for their employers and white fellow employees.

[2] See *General Committee of Adjustment of B. L. E. v. Missouri-Kansas-Texas. R. Co.*, 132 F 2d 91 (5th Cir., 1942), reversed (1943) 320 US 323; *Chicago, M. St. P. & P. R. Co. v. BLF&E*, 397 F 2d 541 (7th Cir., 1968) Cer. Den. (1969) 393 US 1022; *BLF&E v. National Mediation Board*, 410 F 2d 1025, especially at 1027 and 1032, D. of C. Cir., 1969) Cer. Den. (1969) 396 US 878; *Illinois C. R. Co. v. B. L. E.*, 443 F 2d 136 at 138 (7th Cir., 1971); *U. S. v. Jacksonville Terminal Co.*, 316 F. Supp. 567 at 594 and 595, (M. D. Fla., 1970) modified and remanded 451 F 2d 418 (5th Cir., 1971) Cer. Den. (1972) 406 U.S. 906; and *BLF&E v. Southern P. Co.*, 447 F 2d 1127 (5th Cir., 1971).

[3] *Rolax v. Atlantic Coast Line R. Co.*, 186 F 2d 473 (4th Cir., 1951) reversing 91 F Supp 585 (E. D. Va., 1950).

At first impression, it would seem to anyone that the appropriate solution to the problem caused by the accumulation of black firemen would be to require that they be promoted and used as engineers, upon the same terms and conditions as were applied to white firemen; but the black firemen themselves were bitterly opposed to this, and the official report records that Mr. Justice Marshall (before he became such) appeared on behalf of some of them and opposed it in a District Court in Virginia in 1950.[4] The promotion rule which has been referred to as the standard rule required firemen to qualify and serve as engineers in their turn, upon pain of losing their seniority as firemen if they failed to do so. Under the leadership of Mr. Whitaker, who has been President of the IARE since 1950, black firemen on railroads in the Southeast succeeded in getting federal courts to issue injunctions, in a number of cases, against applying to black firemen the same standard promotion rule which applied to white firemen. Their reasoning, as explained in the **Rolax Case**,[5] and by Mr. Whitaker in this case[6], was that they felt that this rule would be unfair to blacks, because black firemen had not had any such expectancy, nor been subject to any such requirement, at the time they were first hired.

In this manner, at the insistence of the blacks, because of what they believed were problems peculiar to blacks, there came into being a unique special arrangement or rule, which was applicable only to blacks; and this was the situation on the national scene in 1956, when the Petitioner Railroad acquired this bargaining unit of black firemen. It was a situation which the Petitioner had done nothing to create.

The undisputed testimony in this case is that every bargaining unit of firemen on the Petitioner Railroad, except that to which the Plaintiffs belonged, had a promotion rule which required the firemene to qualify and serve as engineer in seniority order, or suffer some penalty if they did not do so. In a few places, the penalty was only a severe restriction of rights, but the standard rule called for the discharge of firemen who failed to comply. This

[4] Ibid.
[5] Ibid.
[6] See Appendix J.

had been the situation at least since 1953, and was the situation when the Petitioner acquired this all-black bargaining unit. The undisputed testimony in this case also shows that the members of this bargaining unit objected to having any such promotion rule applied to them, and still did not have one at the time of the trial, but agreed that any and all discrimination against blacks with regard to promotion had been eliminated.

This absence of a compulsory promotion rule in this bargaining unit was the principal difference between the collective bargaining agreement of these firemen and the one applicable to other firemen in the Petitioner's employ, in and after 1956. In all the other bargaining units, most of the firemen were leaving the firing service to work as engineers; but this unique absence of a compulsory promotion rule produced the uniquely large accumulation of firemen that already existed in this unit in 1956 when the Petitioner became their employer.

But the black employees themselves were suffering from the unique effects of the unique arrangements which they had insisted on. The older firemen, who would have been working as engineers on other territories, were still holding the firemen's jobs on this territory, leaving the middle-aged and younger men out of work. Accordingly, the black employees devised their own unique solution to this problem. They negotiated, in their collective bargaining agreement, in 1956, the first compulsory retirement provision that was ever made by this Railroad, requiring retirement from that bargaining unit at age 70. In 1958, they proposed reducing the age to 65, and the Railroad accepted the proposal in principle, but delayed implementing it pending resolution of the concerted effort of all the railroads to abolish all rules requiring them to use firemen.

A Commission was appointed by Executive Order 10891, on November 1, 1961, to study the "feather-bed rules," which included this dispute. The Report of that Commission, in February of 1962, was that firemen were not so essential for the safe operation of diesel locomotives that there should be a rule requiring the railroads to use them; and the Commission recommended compulsory retirement at 65 as a means to adjust the supply of men to conform

to the needs of the service. (See Pages A-63 to A-65).

Emergency Board No. 154, appointed by Executive Order No. 11101 on April 3, 1963, made its report on May 13, 1963. It recommended elimination of firemen's jobs when they became vacant, if filling the jobs would require the hiring of new people; and it also suggested early retirement to eliminate the surplus of firemen.

As Chief Justice Burger said, when he was on the Circuit Court

> "... if anything is clear from the history which preceded Board 282 it is that due to gradual technological changes the traditional functions of the Firemen had become largely obsolete, but the carriers, shippers and the public were not relieved of the burden of unneeded employees. To remedy this problem Congress created Board 282; after lengthy hearings the Board permitted the carriers to extinguish up to ninety percent of the Firemen's jobs."[7]

In that case, the majority added that

> "While the award was in effect (between early 1964 and early 1966), the carriers managed to eliminate about 18,000 firemen's jobs, far more than had been expected."[8]

This all-black bargaining unit was not a party to Award 282. However, shortly after that Award went into effect elsewhere, this unit made an agreement to apply similar provisions to the members of this unit. At the same time, they made an agreement to reduce the retirement age from 70 to 65. These agreements were made in collective bargaining, on June 26, 1964, a week before the enactment of the Civil Rights Act of 1964, and it was stipulated, in effect, that the agreement with respect to retiring at 65 was lawfully made under the Railway Labor Act.

This Petitioning Railroad had an all-white bargaining unit of firemen at Memphis, Tennessee, for whom the mandatory retirement age was reduced to 65, effective in

[7] *B. L. F. & E. v. National Mediation Board*, 410 F 2d 1025 at 1035 (D. of C. Cir., 1969) Cer. Den. (1969) 396 U.S. 878.
[8] Ibid, at page 1027.

1964, and it was still 65 at the time of the trial. However, the reduction of the retirement age to 65 did not take effect for the black firemen until December 31, 1966, which was after the expiration of Award 282 and 2-1/2 years after the agreement was made to reduce the age to 65.

While Award 282 was in effect by its own terms, the BLF&E lost so many jobs that they started a new drive in 1966 to negotiate rules requiring replacement of firemen's jobs that had been eliminated.[9].

Meanwhile, however, the agreement covering this all-black bargaining unit had not eliminated a single job for firemen. Plaintiffs Peters and Emanuel both testified that they were on the extra board, and did not have a regular job, at the time they were retired, at the beginning of 1967. (See Appendices K and L). Local Chairman Wiggins testified on November 13, 1969, that there was still one man on the extra board. (See Page A-69). This clearly shows that, six years after Award 282 was rendered, and nearly three years after the effective date of the age-65 retirement provision, not a single fireman's job had been eliminated. Mr. Wiggins testified on September 16, 1970, that there were 22 jobs and 19 firemen at that time. (See Appendix M), and this shows that it was not until 1970 that any firemen jobs were entirely eliminated on this district.

The agreement applying 282, and the agreement reducing the retirement age, taken together, did not have anywhere near as great an effect on this bargaining unit, as Award 282 and the compulsory promotion rules had on the Petitioner's other bargaining units of firemen. In a number of them, it had become necessary to hire additional firemen; and by the time the age-65 retirement became effective in this all-black unit, Negro firemen had been employed in many of the other units that were previously all white. (See Page A-73).

The Equal Employment Opportunity Commission is not

[9] See for example *Brotherhood of R. Trainmen v. Akron, & B. B. R. Co.*. 385 F 2d 581 (D. of C. Cir., 1967) Cer. Den. (1968) 390 US 923; and *Brotherhood of Locomotive Firemen & Enginemen v. Central of Georgia Ry. Co.*, 411 F. 2d 320 (5th Cir., 1969).

a party to the case, but requested and received permission to file a brief in the Court of Appeals because of its desire to uphold the large amount of the attorney's fee which the District Court had awarded to the Plaintiff's attorneys.

REASONS FOR GRANTING THE WRIT

1. The Railroad did not engage in any conduct which produced actual discrimination against the black firemen because of their race.

In its original opinion, the Court of Appeals said (Page A-21).

> "The Railroad hired only blacks to work as firemen on the DeQuincy Division and only whites as firemen elsewhere."

The Petitioner pointed out, in its Petition for Rehearing, that it had never hired any firemen, black or white on this territory. Therefore the Petitioner could not have had, with respect to this territory, what the Court referred to (Page A-26) as " 'the (Railroad's pre-Act) discriminatory hiring policies'."

The Court, in denying the Petition for rehearing changed the sentence quoted above to make "hired" read "employed." However, the sentence, as changed is not correct either. The undisputed evidence is that the Plaintiff Boyd Peters was working as a fireman on another division in 1964, at the time these agreements were signed and the Civil Rights Act was enacted[10]; and that, by the end of 1966, when the reduction in the retirement age went into effect, Negro firemen had been hired and were working at various other points on the system of the Petitioner Railroad.[11]

What the Court of Appeals referred to (Page A-27) as "the generic tradition of discrimination against blacks by the railroad industry" was documented with references to cases in which it was the white fellow-employees, through their all-white unions, which initiated and compelled discriminatory measures and received the benefits therefrom. It is clear that, in this case, this employer was

[10] See Page A-84.
[11] See Page A-73.

suffering severely as the victim of the compulsion of these same employees, by having to pay high wages to firemen it neither needed nor wanted.

It would be unfair to base a judgment against the Petitioner on pre-act discrimination anyhow. For one thing, no issue as to pre-Act discrimination was presented to the trial court or tried, because the Plaintiffs stated that they sought no relief on the basis of pre-act discrimination.[12] Furthermore, the Petitioner could hardly have been responsible, because the U.S. District Court at St. Louis, through the Trustee in Bankruptcy, was in control of the Petitioner up to 1956. And it would be contrary in principle to what this Court said in **Griggs v. Duke Power Co.**,[13] which was that

> "In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. Discriminatory preference for any group, minority or majority, is precisely and only what Congress has prescribed."

The case was not fairly represented by the statement in the opinion of the Court of Appeals (page A-26) that their collective bargain agreement[13] "imposed" "differential treatment" on the black firemen —

> "by requiring that they retire five years earlier than white firemen."

Assuming for the moment that the firemen elsewhere on the system could be considered comparable merely because they had the same name, still, there was nothing which required black firemen to "retire five years earlier than white firemen." No provision of the collective bargaining agreement which applied to the plaintiffs applied to any fireman, white or black, on any other territory; and no provision of the collentive bargaining agreement of any other bargaining unit applied to anyone working on the plaintiffs' territory.

In this case, most of the bargaining units of firemen were subject to retirement at 70, and some of these units

[12] See Pages A-68, A-69.
[13] 401 US 424 (1971).

were all white, and some, as of the date of the alleged violation of the Act, were racially integrated. However, there were two units of firemen in which the retirement age was 65. In one, all the members were white; and in the other, all the members were black. In the all-white one, at Memphis, the provision for retirement at 65 is admittedly valid and would be enforced by the courts.[14] However, in the other, at DeQuincy, the Courts below have relieved the members of this requirement because they are black.

As the Court said in the **Griggs case**, this kind of discriminatory preference is precisely what Congress forbade.

In dealing with the facts of this case, the Courts below fell into their most serious error because they failed to heed the advice this Court gave in 1966, which was as follows:

> "A collective bargaining agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts which control such private contracts.
>
> '... (I)t is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. The collective agreement covers the whole employment relationship. It calls into being a new common law — the common law of a particular industry or of a particular plant.'
>
> ... In order to interpret such an agreement it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements."[15]

The Courts below, in comparing this bargaining unit to others, arbitrarily refused to consider other units whose members were not firemen, though they were integrated

[14] See *McMullans v. Kansas, O.&G. Ry. Co.*, 229 F 2d 50 (10th Cir., 1956), Cer. Den. (1956) 351 US 918; and *Goodin v. Clinchfield R. Co.*, 229 F 2d 578 (6th Cir., 1956), Cer. Den. (1956) 351 US 953.

[15] *Transportation Communication Employees Union v. Union Pacific R. Co.*, 385 U.S. 157 at 160, 161.

and had a prescribed retirement age of 65.[16] Also, the Plaintiffs stated to the Trial Court that they were not contending that there was any discrimination in respect to anything other than the retirement age; and so the Courts below also restricted their comparison of bargaining units of firemen to that single aspect, the age of retirement.[17] In so doing, they excluded from their consideration the most important difference between this unit of firemen and the other units of firemen. That difference was in the compulsory promotion rule. It was not until the Court of Appeals wrote its footnote 25A in denying the petition for rehearing that the Court of Appeals ever made any reference to the difference between these bargaining units in respect to the promotion rule.

There were a few white firemen who had not qualified and moved into service as engineers, but they had suffered a restriction of their rights, under promotion rules which required firemen to qualify and serve as engineers, or suffer some real penalty. This all-black bargaining unit would never accept that kind of a promotion rule, nor any penalty or restriction. Furthermore, there were only a few of those firemen on other territories, while MOST of the firemen on the other territories had been routinely fulfilling that requirement, and moving on out of the ranks of the firemen (for which the Petitioner had no need) and into the ranks of engineers (for which the Petitioner did have a continuing need). The few "fixture firemen" with restricted rights that did exist on other territories were negligible as a factor in determining the effect of Award 282, because that Award required the Petitioner to fill at least 10% of those firemen's jobs anyhow. However, on the plaintiffs territory NONE of the firemen left the ranks of firemen to become engineers, and this was an overwhelming and controlling difference.

It was the refusal of the firemen in this all-black unit to accept a compulsory promotion rule that caused the large number of senior firemen; and that was the condition "which made necessary the intraunion choice between the competing economic interests of its members."[18]

[16] See Pages A-71 to A-73.
[17] See Pages A-68, A-69, A-74, A-76.
[18] See Page A-30.

Industry-wide, only about 4% of the firemen were over 65 in 1959, and about 30% of the engineers were over 65 in 1959.[19] There is no reasonable way that this difference could be described, as the Court of Appeals described it (see page A-30), as being "an effect of past racial discrimination by the employer."

In its second opinion, denying a rehearing in this case, the Court of Appeals stated (page A-40) some additional erroneous conclusions, which were that

> "the interaction of 282 with the age 65 retirement agreement, once the latter became effective, placed an additional burden upon the black firemen,"

and that

> "When the older black firemen were forced to retire, their jobs were 'blanked'."

and that

> "This reduction in firemen's jobs held by blacks was accomplished without a corresponding elimination of fremen's jobs held by whites since white firemen, generally, were not forced to retire until age 70."

On the contrary, the evidence shows that two of the Plaintiffs did not have a job when they retired, on January 1, 1967, and that there were more men than jobs on this territory at all times up to 1970, although nationwide 18,000 firemen's jobs had been eliminated by early 1966 by reason of Award 282. Here, again, the error was caused by failing to consider the compulsory promotion rule; Generally speaking, white firemen did not retire at all as firemen, but instead they retired as engineers, some years after they had vacated their jobs as firemen.

Furthermore, the Court of Appeals was in error when it said (Page A-40) in denying the petition for rehearing, that

> "the (trial) court found that the black retirees were no less competent for firemen's jobs than their white counterparts."

The black retirees did not have any white counterparts. In fact, no white fireman 65 years old or over was identified; and the Trial Court did not say this.

[19] See Page A-63.

2. To the extent that there were differences in the effects produced on the various firemen, by the different retirement ages prescribed by their respective collective bargain'ng agreement, those differences were related to job performance and to the business necessity of the Petitioner.

In this case the Court of Appeals said (page A-27) that

> "...the courts have consistently gone further to scrutinize the etiology, as revealed by the evidence, of the present terms and conditions of employment alleged to violate Title VII. And where they have found a causal nexus between the past discrimination and the challenged present condition of employment, not justified by some 'business necessity' which itself complies with Title VII, the courts have held that the present condition violates Title VII."

The rule stated by this Court in this regard is that

> "...The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be releated to job performance, the practice is prohibited."[20]

Every important tribunal which studied the matter found that, in general, the railroads did not need firemen in freight service except as trainee and extra engineers. The firemen in all the other bargaining units were willing to agree, under some penalty, to fulfill that requirement; and, with only a few exceptions, they were becoming engineers. Therefore, there was a business necessity for having firemen on the other territories. As these black firemen refused to accept that responsibility, there was no use for them at all in freight service, and there was no longer any passenger service to use them in. How could there be a clearer distinction, on the basis of business necessity, between the black firemen on this territory and all the firemen, black or white, for whom the applicable retirement age was 70?

Indeed, this would fall within the principle that this Court had in mind when it suggested that

> "requirements that take into account capability for

[20] *Griggs v. Duke Power Co.*, (1971) 401 U.S. 424. at 430, 431.

the next succeeding position or related future promotion might be utilized upon a showing that such long-range requirements fulfill a genuine business need."[21]

To put the matter in other language, which the Court of Appeals also used (page A-33), retirement of the Plaintiffs was clearly related to job performance, because there was in fact no need or use for their services, and in 1970, when some of the firemen's jobs on this territory finally became vacant, no replacements were hired.

Nevertheless, the Courts below relieved the Plaintiffs of the requirement of retirement at 65, because they are black, and directed the Petitioner to pay back wages to the plaintiffs for not working on jobs which the Petitioner did not need, and did not want to fill with anybody, black or white.

3. **The ruling by the Court of Appeals violates the 1866 Civil Rights Act by relieving the Plaintiffs, because of their race, from the compulsory retirement exacted by their collective bargaining agreement, when white citizens of the U.S. are held subject to the compulsory retirement exacted by theirs; and, in doing so, it establishes a principle that Negro employees do not have the same rights, which white citizens of the U.S. have, to make enforceable contracts governing the conditions of their own labor.**

The principles used to invalidate this agreement are as flexible and accommodating as a wax nose; they can just as easily be used to invalidate any other contract. All they require is that the Plaintiffs be black.

The black firemen, on this territory admittedly did not want the same conditions of employment which the men in the all-white and integrated units elsewhere wanted. Right or wrong, if they were free men, with the freedom of contract, they should have been able to contract for the kind of conditions they wanted. To do this, they would also have to be able to contract for adjustments in the rules in other respects, in order to accommodate the results of the differences they would be contracting for. To deny to blacks the right to make a valid contract for their

[21] Ibid, 401 US 424, at page 432.

own labor, unless the terms conform to those made by white men for white men, is the shabbiest kind of a pretense of freedom, like giving them money which is labeled counterfeit.

Superficially, it may look like you are doing a favor for Negroes, when you say that they are not bound by their agreements. Married women were always told that the limited disability of coverture, which they had in some places, was a boon and a protection to them. However, members of this Court described it as distasteful, and as "the archaic remnant of a primitive caste system," and it is doubtful if it exists today anywhere in the U.S.[22] The women themselves demanded its abolition; because, when their contracts were voidable, no one would make contracts with them, and their freedom was impaired. In other words, a disability is what the word implies; it is a restraint upon freedom.

In 1906, this Court said that

> "one of the disabilities of slavery, one of the **indicia** of its existence, was a lack of power to make or perform contracts;"[23]

and, of course, that is the reason that the 1866 Act was passed and has been retained. In the same case, this Court also said in 1906;

> "... at the close of the Civil War, when the problem of the emancipated slaves was before the nation, it might have left them in a condition of alienage, or established them as wards of the government, like the Indian tribes, and thus retained for the nation jurisdiction over them, or it might, as it did, give them citizenship. It chose the latter. By the 14th Amendment it made citizens of all born within the limits of the United States and subject to its jurisdiction. By the 15th it prohibited any state from denying the right of suffrage on account of race, color, or previous condition of servitude, and by the 13th it forbade slavery or involuntary servitude anywhere within the limits of the land. Whether this was or was not the wiser way to deal with the great problem

[22] *U.S. v. Yazell*, (1966) 382 US 404.

[23] *Hodges v. U.S.*, 203 U.S. 1, at 17.

> is not a matter for the courts to consider. It is for us to accept the decision, which declined to constitute them wards of the nation or leave them in a condition of alienage where they would be subject to the jurisdiction of Congress, but gave them citizenship, doubtless believing that thereby in the long run their best interests would be subserved, they taking their chances with other citizens in the states where the should make their homes."[24]

In 1968, in **Jones v. Mayer,**[25] in extending the scope and vitality of the 1866 Act, this Court overruled the holding in the 1906 case, but only insofar as it was inconsistent with that in **Jones v. Mayer;** and thus the statements quoted above, which are consistent with those in **Jones v. Mayer,** were, by implication, re-affirmed as still being the law.

But the decision by the Court of Appeals in this case pushes the Negro back one notch, and makes him a second class citizen, like an infant or lunatic, who is not capable of handling his own business, and must get a white man to do it for him. It does this in spite of the remarkable success which the black firemen had in achieving, through their own bargaining, the objectives which they themselves selected.

[24] Ibid, at 19, 20.
[25] 392 US 409.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES POPE SIMPSON
1507 Pacific Avenue — Room 900
Dallas, Texas 75201

Attorney for the Petitioner
MISSOURI PACIFIC
RAILROAD COMPANY

APPENDIX

Appendix A: The Statutes which the case involves.

1 TITLE 42, § 1981. EQUAL RIGHTS UNDER THE LAW

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue. be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. R.S. § 1977 (Source, Civil Rights Act of 1866, as amended and re-enacted in 1870).

2 TITLE VII OF THE CIVIL RIGHTS ACT OF 1964: TITLE 42, § 2000e — 2. UNLAWFUL EMPLOYMENT PRACTICES — EMPLOYER PRACTICES

(a) It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against an individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * * * *

Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid to or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

* * * * *

Preferential treatment not to be granted on account of existing number or percentage imbalance

(j) Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor

organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area. Pub.L. 88-352, Title VII, § 703, July 2, 1964, 78 Stat. 255.

5. Enforcement provisions —
Charges by persons aggrieved or member of Commission; copy of charges to respondents; investigation of charges; conference, conciliation, and persuasion for elimination of unlawful practices; prohibited disclosures; use of evidence in subsequent proceedings; penalties

(a) Whenever it is charged in writing under oath by a person claiming to be aggrieved, or a written charge has been filed by a member of the Commission where he has reasonable cause to believe a violation of this subchapter has occurred (and such charge sets forth the facts upon which it is based) that an employer, employment agency, or labor organization has engaged in an unlawful employment practice, the Commission shall furnish such employer, employment agency, or labor organization (hereinafter referred to as the "respondent") with a copy of such charge and shall make an investigation of such charge, provided that such charge shall not be made public by the Commission. If the Commission shall determine, after such investigation, that there is reasonable cause to believe that the charge is true, the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods

of conference, conciliation, and persuasion. Nothing said or done during and as a part of such endeavors may be made public by the Commission without the written consent of the parties, or used as evidence in a subsequent proceeding. Any officer or employee of the Commission, who shall make public in any manner whatever any information in violation of this subsection shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or imprisoned not more than one year.

* * * * *

Time for filing charges after occurrence of unlawful practices or termination of State or local enforcement proceedings; filing of charges by Commission with State or local agency

(d) A charge under subsection (a) of this section shall be filed within ninety days after the alleged unlawful employment practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b) of this section, such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

Civil actions for prevention of unlawful practices; legal representation; commencement of action without payment of fees, costs, or security; intervention by Attorney General; stay of Federal proceedings

(e) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) of this section (except that in either case such period may be extended to

not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance with this subchapter, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complaintant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (b) of this section or the efforts of the Commission to obtain voluntary compliance.

Jurisdiction and venue of United States courts

(f) Each United States district court and each United States court of a place subject to the jurisdiction of the United States shall have jurisdiction of actions brought under this subchapter. Such an action may be brought in any judicial district in the State in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained and administered, or in the judicial district in which the plaintiff would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office. For purposes of sections 1404 and 1406 of Title 28, the judicial district in which

the respondent has his principal office shall in all cases be considered a district in which the action might have been brought.

Injunctions; appropriate affirmative action; reinstatement, hiring, back pay; reduction of back pay by interim earnings or amount earnable; limitations on judicial orders

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 2000e-3(a) of this title.

Provisions of sections 101 to 115 of Title 29 not applicable to civil actions for prevention of unlawful practices

(h) The provisions of sections 101 to 115 of Title 29 shall not apply with respect to civil actions brought under this section.

Appeals

(j) Any civil action brought under subsection (e) of this section and any proceedings brought under subsection (i) of this section shall be subject to appeal as provided in sections 1291 and 1292, Title 28.

* * * * *

Pub.L. 88-352, Title VII, § 706, July 2, 1964, 78 Stat. 259.

3. RAILWAY LABOR ACT: TITLE 45, § 151-162.

§ 151a. General purposes

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions. May 20, 1926, c. 347, § 2, 44 Stat. 577; June 21, 1934, c. 691, § 2, 48 Stat. 1186.

§ 152. General duties — Duty of carriers and employees to settle disputes

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Consideration of disputes by representatives

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Designation of representatives

Third. Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to

induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Agreements to join or not to join labor organizations forbidden

Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract of agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Conference of representatives; time; place; private agreements

Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to

reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Change in pay, rules, or working conditions contrary to agreement or to section 156 forbidden

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

Notices of manner of settlement of disputes; posting

Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim, in large type the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are made a part of the contract of employment between the carrier and each employee and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Disputes as to identity of representatives; designation by Mediation Board; secret elections

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to

represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Violations; prosecution and penalties

Tenth. The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000, nor more than $20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions

of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

Union security agreements; check-off

Eleventh. Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted —

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of

any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided*, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of paragraph (h) of section 153 of this title, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however*, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further*, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization

to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended. May 20, 1926, c. 347, § 2, 44 Stat. 577; June 21, 1934, c. 691, § 2, 48 Stat. 1186; June 25, 1948, c. 646, § 1, 62 Stat. 909; Jan. 10, 1951, c. 1220, 64 Stat. 1238.

Title 45, § 155. Functions of Mediation Board — Disputes within jurisdiction of Mediation Board

First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

* * * * *

May 20, 1926, c. 347, § 5, 44 Stat. 580; June 21, 1934, c. 691, § 5, 48 Stat. 1195; June 25, 1948, c. 646, § 32(a), 62 Stat. 991; May 24, 1949, c. 139, § 127, 63 Stat. 107.

Title 45, § 156. Procedure in changing rates of pay, rules, and working conditions

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board. May 20, 1926, c. 347, § 6, 44 Stat. 582; June 21, 1934, c. 691, § 6, 48 Stat. 1197.

Appendix B: The Judgment of and Opinions of the Court of Appeals in this case.

1 Judgment dated April 10, 1973.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1971

No. 71-3566

D. C. Docket No. 1325

BOYD PETERS, ET AL,
Plaintiffs-Appellees,

versus

MISSOURI-PACIFIC RAILROAD COMPANY,
Defendant-Third Party
Plaintiff-Appellant,

versus

UNITED TRANSPORTATION UNION,
Third Party Defendant.

Appeal from the United States District Court for the Eastern District of Texas
Before WISDOM, THORNBERRY and GODBOLD, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed:

It is further ordered that defendant-third party plaintiff-appellant pay to plaintiffs-appellees the costs on appeal to be taxed by the Clerk of this Court.

April 10, 1973

2 Opinion dated April 10, 1973.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-3566

BOYD PETERS, ET AL,
Plaintiffs-Appellees,

versus

MISSOURI-PACIFIC RAILROAD COMPANY,
Defendant-Third Party
Plaintiff-Appellant,

versus

UNITED TRANSPORTATION UNION,
Third Party Defendant.

Appeal from the United States District Court for the Eastern District of Texas

(April 10, 1973)

Before WISDOM, THORNBERRY and GODBOLD, Circuit Judges.

GODBOLD, Circuit Judge: This case presents the question of whether the defendant Missouri-Pacific

Railroad violated Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-2(a) (1970),[1] by entering into and enforcing a collective bargaining agreement providing for retirement at age 65 for firemen on its DeQuincy Division, all of whom were black. The agreement was made with International Association of Railway Employees (IARE), the union representing the firemen on the DeQuincy Division. The entire membership of IARE Local Lodge 3 was composed of the DeQuincy Division firemen. When the agreement in question was made substantially all firemen on the Railroad's other divisions were white. The white firemen were represented by unions other than IARE[2] and, except for the firemen on one division, were subject to separate collective bargaining contracts setting compulsory retirement at age 70.[3] The retirement provision

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[1]"It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

[2]The white firemen were organized into many bargaining units and were represented by either the Brotherhood of Locomotive Firemen & Enginemen (BLF&E) or the Brotherhood of Locomotive Engineers (BLE), both of which maintained whites-only membership policies before the passage of the Civil Rights Act of 1964.

[3]We entertain no doubt that Congress intended Title VII to reach retirement plans as conditions of employment, just as such plans are viewed as employment conditions under the National Labor Relations Act. See Bartmess v. Drewrys U.S.A., Inc., 444

for black firemen was signed June 26, 1964, prior to passage of the Civil Rights Act of 1964, but by agreement did not become effective until December 31, 1966, subsequent to the Act's effective date, July 2, 1965.

Plaintiffs are six black members of Local 3 formerly employed as firemen by the Missouri-Pacific on the DeQuincy Division. Pursuant to the 1964 agreement, and because they were over 65, five of them were retired on January 4, 1967 and the sixth on October 5, 1968. Upon retirement they began receiving pensions smaller than their wages would have been had they continued working. The plaintiffs sued under 42 U.S.C.A. § 2000e-5(e) and (f) (1970) alleging that the Railroad had dscriminated against them by forcing their retirement solely because of their race, in violation of 42 U.S.C.A. § 2000e-2(a). The Railroad answered and brought a third party complaint against BLF&E, the then bargaining representative of the DeQuincy firemen, and four local union officials who were sued as representatives of the "class of persons holding seniority as Locomotive Firemen" on the DeQuincy Division. The court granted the Railroad's motion to maintain the third party action against this class, and no-

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F.2d 1186, 1188-89 (7th Cir. 1971), *cert. denied*, 404 U.S. 939, 30 L.Ed. 2d 252 (1971).

Retirement plans establishing different ages for retirement of male and female employees of one employer violate Title VII. Rosen v. Public Service Electric and Gas Co., 328 F. Supp. 454 (D.N.J.), *aff'd on rehearing*, 328 F. Supp. 454 (1970), and Bartmess v. Drewrys U.S.A., Inc., *supra*.

tice was given to the Railroad's employees constituting the class.[3A]

Sitting without a jury, the District Court found that the earlier retirement age for the black firemen violated 42 U.S.C.A. § 2000e-2(a) (1970) because their white counterparts, under separate agreements, were permitted to continue working to age 70. The court awarded all plaintiffs back wages for the time they could have worked[4] but for the age 65 retirement agreement, ordered reinstatement for two plaintiffs not then age 70, and awarded attorney fees to plaintiffs' counsel. The Railroad appeals. We affirm.

I. The history.

The record fully supports the findings of the District Court that prior to 1964 the Railroad classified, separated and segregated its employees on the basis of race, and that this resulted in the racial composition

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[3A]The third party action, in which a class composed of the then employed DeQuincy Division firemen were named as defendants, was protective in nature. The Railroad sought no money damages. Rather it asked, in the event judgment was granted for plaintiffs and reinstatement ordered, that it be protected against retribution from the union and the class of firemen represented whose bargained seniority rights might be affected by the Railroad's efforts to comply. The final judgment granted such relief. The third party defendants have not appealed from that judgment.

[4]The court received evidence and made findings on the periods of time respective plaintiffs would have been physically unable to work even if they had not been mandatorily retired at age 65.

of Local 3 of IARE.[5] Black and white firemen worked in different geographical areas and, as we have pointed out, were represented by different unions.[6] Black firemen received inferior rates of pay and fringe benefits and worked longer hours than their white counterparts. The Railroad hired only blacks to work as firemen on the DeQuincy Division and only whites as firemen elsewhere.

In 1956, shortly after Missouri-Pacific took over the small lines and their black firemen, the Railroad received a request from H. W. Simpson, Chairman of IARE Local 3, asking that firemen on the DeQuincy Division be mandatorily retired at age 70. Prior to that time there had been no mandatory retirement age for any of the Railroad's firemen. According to oral testimony given at trial, Simpson had been elected as the candidate of younger firemen, displacing a chairman

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[5]The black firemen became employees of Missouri-Pacific in 1956 when by merger it acquired their former employers, three small railroads, which became part of defendant's DeQuincy Division. IARE had been their collective bargaining agent for many years prior to the mergers, and it represented employees of other railroads as well.

[6]IARE was created in 1934 to represent blacks employed by the railroad industry because blacks were not admitted to membership in the "Big Five" all-white railroad unions. According to testimony of its President Whitaker, IARE, prior to the passage of the Civil Rights Act of 1964, resisted efforts of BLF&E, one of the "Big Five," to take over bargaining for the black firemen of the DeQuincy Division because it feared the whites-only union would not fairly represent the blacks' interests. In 1968, after the events involved in this appeal and after IARE had begun voluntary dissolution because rights of full membership and fair representation were being granted blacks by the "Big Five" unions the BLF&E became the certified representative of the black firemen of the DeQuincy Division.

who favored the older men. The written request ma
by Simpson to the Railroad included these stated re
sons:

> [S]uch an agreement would be an asset to the Carriers economically, and would increase the efficiency and safety in the performance of duties. It would give some of the twenty-five furloughed firemen a chance to work. There are some men with more than twelve years of service who have not worked in years. Young men with families have no hope of entering the service unless some form of compulsory retirement is agreed upon. We have firemen who are over seventy years of age hardly physically fit to remain in the service.

President Whitaker of IARE testified that Chairm
Simpson had reasoned that, although older firem
would be put out of work by mandatory retireme
they would still draw pensions, whereas the young
nonworking firemen, who had exhausted their une
ployment benefits, were presently without means
support. The Railroad agreed to Local 3's 1956 reque

White firemen first became subject to compulso
retirement in 1959, when an agreement was negotiat
with unions representing some of them providing f
retirement at 70. In 1963 most of the remaining whit
became subject to mandatory retirement at 70.

In 1958 IARE, by letter, suggested to the Railro
that the mandatory retirement age for the blacks

reduced to 65. But in 1959 most of the railroads in the country served notice under Section 6 of the Railway Labor Act[7] that they wanted to change all collective bargaining agreements so as to, in effect, eliminate all firemen on diesel locomotives. The IARE's age 65 request lay dormant while the nation's railroads and railroad unions fought over the status of firemen. This national dispute was finally settled in 1963 by Award 282 of a National Mediation Board. Award 282 allowed the railroads, once its terms were adopted into the collective bargaining contracts between the unions and railroads, (1) to terminate firemen with less than two years seniority and then "blank", *i.e.* leave open and unfilled, their jobs; (2) to terminate firemen with more than two years seniority whose average monthly earnings for the last two years had not exceeded $200 and then blank their jobs; (3) to terminate firemen with more than two years seniority who had not worked in two years and blank their jobs; and (4) to blank the jobs of firemen who retired after the effective date of the Award. The jobs of firemen who had 10 years seniority and whose average monthly earnings were in excess of $200 were protected by the Award.

The national dispute and Award 282 substantially altered the employment context of the Railroad's firemen by protecting the employment status and opportunities of some but destroying the status and opportunities of others. The Award would materially reduce the labor requirements of the Railroad, but only after it succeeded in having the terms of Award 282 includ-

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[7] 45 U.S.C.A. 151 *et seq.* (1972).

ed in the collective bargaining agreements it had wi unions representing its firemen. Thus, in May 1964, t Railroad proposed to IARE, as subjects of collecti bargaining, the adaptation and application of the pr visions of Award 282 to the black firemen of its D Quincy Division and the reduction of the mandato retirement age of the black firemen from 70 to 65. Di cussion of these two subjects[8] took place in separa meetings of the Railroad with President Whitaker IARE and with Chairman Simpson and Committeema Stewart of Local 3.

Pursuant to an understanding reached at these mee ings, the Railroad prepared two written agreement one applying the terms of Award 282 to the black fir men and the other providing for their mandatory r tirement at age 65, and sent them for execution IARE, the certified bargaining representative. Pres dent Whitaker signed both on June 19, 1964, and, a cording to IARE's intraunion agreement with Local sent them to Chairman Simpson. Simpson and Loca Committeeman Miller added their signatures on Jun 22, 1964, and returned the agreements by mail to th Railroad, which received them June 25, 1964.[9] Th

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[8]Other conditions of employment, including the disparity betwee the pay scales and fringe benefits of white and black firemer were discussed as well.

[9]In the same mail, the Railroad also received a letter from plainti Placide, dated June 23, 1964, stating that Charles Stewa "has been appointed General Chairman of Firemen, represen ed by the International Association of Railway Employee succeeding Mr. H. N. Simpson," and asking that any co respondence be sent to Stewart. The letter did not mentio the two agreements. See n. 26 at p. 16 *infra*.

Railroad's director of labor relations executed the agreements for the Railroad on June 26, and inserted that date in the blank spaces provided for execution dates. By its terms the agreement regarding Award 282 became effective retroactively on June 1, 1964, but the effective date of the age 65 agreement was delayed by its terms until December 31, 1966.

The interaction of the two agreements, once the age 65 contract became effective, caused the burden of Award 282 to fall sooner upon the Railroad's black firemen than upon whites and produced a reduction in the number of firemen's jobs held by blacks[10] without a corresponding decrease also being made, at that time, in the number of firemen's jobs held by whites. Once the older black firemen were forced to retire, their jobs were "blanked" and no new blacks hired to replace them. However, as President Whitaker explained, the Railroad was not successful in getting the provisions of Award 282 included in the collective bargaining contracts it had with unions representing white firemen until "five more hard years" of arbitration. The court found that while blacks were being required to retire at 65 on pensions, whites were permitted to continue working, although the black retirees were no less competent for firemen's jobs.

The mandatory retirement age for black firemen continued to be 65 until June 1969, after this suit was filed. At that time the Railroad and BLF&E, which by then

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[10]The parties stipulated that the effect of the age 65 agreement was to reduce the number of black firemen employed by the Railroad.

had become bargaining representative for the black firemen as well as for some white firemen, agreed to raise the age to 70, the mandatory age for substantially all the Railroad's white firemen.

II.

The District Court found that the Railroad had "discriminated against" the black firemen of its DeQuincy Division "because of their race" prior to the effective date of the Act (July 2, 1965) and that the age 65 retirement agreement, and the differential treatment it imposed on the black firemen by requiring that they retire five years earlier than white firemen, were "the result of the [Railroad's pre-Act] discriminatory hiring policies." The trial judge concluded that the retirement agreement (which was negotiated and executed pre-Act but became effective and was enforced against these plaintiffs post-Act) "adversely affected" plaintiffs' status as employees and "discriminated against" them on the basis of their race. The court further concluded that the retirement agreement "carried forward into the present and the future effects of prior racially discriminatory employment practices of defendant." The court held that the actions of the Railroad in entering into and enforcing the retirement agreement constituted an unlawful employment practice in violation of 42 U.S.C.A. § 2000e-2(a), and it granted judgment for plaintiffs.

The parties urge differing legal consequences to be drawn from the pre-Act history of the Railroad's relationship with the black firemen of the DeQuincy Division. The plaintiffs seek to employ this history, and

its nexus to the generic tradition of discrimination against blacks by the railroad industry,[11] as a sword entitling them by its sole force to a judgment against this employer. The Railroad seeks to employ the same history, considered in the context of the requirements of the Railway Labor Act, as a shield insulating it from Title VII liability. In our view neither position is correct and neither reflects the careful analysis embodied in the determinations of the District Court.

The plaintiffs' theory is essentially an argument that a showing of historical pre-Act racial discrimination alone establishes a per se violation of Title VII. We rejected that theory in *U.S. v. Jacksonville Terminal Co.*, 451 F.2d 418, 450 (5th Cir. 1971), *cert. denied*, 406 U.S. 906, 31 L.Ed. 2d 815 (1972). See also L. Sutter, *Current Procedural and Evidentiary Consideration Under Title VII of the Civil Rights Act of 1964: Ready for the Defense*, 6 Ga. L. Rev. 505, 516 (1972). In applying Title VII courts have not ended their factual examinations and legal analyses at the point where they find historical evidence of pre-Act, racially discriminatory treatment by the employer. Rather, recognizing that Title VII operates only prospectively, the courts have consistently gone further to scrutinize the etiology, as revealed by the evidence, of the present terms

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[11] A tradition well recorded in federal jurisprudence. *See, e.g.*, Steele v. Louisville & Nashville R. Co., B.L.F.&E., etc., 323 U.S. 192, 89 L.Ed. 173 (1944); Tunstall v. B.L.F.&E., 323 210, 89 L.Ed. 187 (1944); B of L.E. v. Palmer, 178 F.2d 722 (D.C. Cir. 1949); Mitchell v. Gulf, Mobile & Ohio R. Co., 91 F. Supp. 175 (N.D. Ala. 1950), *modified and aff'd sub nom.* B.L.F.&E. v. Mitchell, 190 F.2d 308 (5th Cir. 1951); Rolax v. Atlantic Coast Line R. Co., 186 F.2d 473 (4th Cir. 1951); and Norman v. Missouri-Pacific R. Co., 414 F.2d 73 (8th Cir. 1969).

and conditions of employment alleged to violate Title VII. And where they have found a causal nexus between the past discrimination and the challenged present condition of employment, not justified by some "business necessity" which itself complies with Title VII, the courts have held that the present condition violates Title VII. *Griggs v. Duke Power Co.*, 401 U.S. 424, 28 L.Ed. 2d 158 (1971); *Local 189, United Papermakers, etc. v. U.S.*, 416 F.2d 980 (5th Cir.), *cert. denied*, 397 U.S. 919, 25 L.Ed. 2d 100 (1970); *U.S. v. Jacksonville Terminal Co., supra*, and *Rowe v. General Motors Corp.*, 457 F.2d 358 (5th Cir. 1972). Relief has then been granted even in the absence of a showing of present intent to discriminate[12] and even in the presence of a showing of present good intent towards alleged discriminatees.[13]

The Railroad's theory, on the other hand, is that it is shielded from Title VII liability for this retirement agreement because the objectionable provisions were acceded to by it at the request of IARE. The underpinnings for its theory are these: (1) It is required by the Railway Labor Act (RLA) to bargain with the certified representative of its black firemen on proposals concerning conditions of employment.[14] (2) The firemen's bargaining representative has the statutory duty fairly to represent the black firemen for whom it bar-

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[12]See Griggs v. Duke Power Co., 401 U.S. 424, 432, 28 L.Ed. 2d 158, 165 (1971).

[13]See Rowe v. General Motors Corp., 452 F.2d 348, 355 (5th Cir. 1972), and Griggs v. Duke Power Co., 401 U.S. 424, 432, 28 L.Ed. 2d 158, 165 (1971).

[14]45 U.S.C.A. § 152 (1972).

gains without discrimination because of their race.[15] (3) The challenged age 65 retirement agreement is itself a product of collective bargaining, having been first proposed for bargaining by the plaintiffs' bargaining representative (IARE) and finally agreed to by IARE and the officers of plaintiffs' local. (4) The plaintiffs do not contend that the agreement and the actions of their representative and officers in proposing and assenting to it violated the requisites of the RLA's duty of fair representation.

This theory too must be rejected. The age 65 agreement quite reasonably can be viewed as the product, in part, of intra-union political resolution of competing economic interests of the older and younger black firemen in a declining job market and as the fruition of their bargaining representative's good faith representation of the economic interests of the politically victorious younger firemen.[16] But if the conditions which

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[15]See Steele v. Louisville and Nashville R. Co., B.L.F.&E., etc., 323 U.S. 192, 202-3, 89 L.Ed. 173, 183 (1944); Vaca v. Sipes, 386 U.S. 171, 17 L.Ed. 2d 842 (1967); Tunstall v. B.L.F.&E., 323 U.S. 210, 89 L.Ed. 187 (1944), and Brotherhood of R. Trainmen v. Howard, 343 U.S. 768, 96 L.Ed. 1283 (1952).

[16]Steele v. Louisville & Nashville R. Co., B.L.F.&E., etc., 323 U.S. 192, 203, 89 L.Ed. 173, 183 (1944):

> "[The RLA's imposition of a duty of fair representation] does not mean that the statutory representative of a craft is barred from making contracts which may have unfavorable effects on some of the members of the craft represented. Variations in the forms of the contract based on differences relevant to the authorized purposes of the contract on conditions to which they are to be applied . . . are within the scope of the bargaining representation of a craft, all of whose members are not identical in their interest or merit."

created the intraunion economic warfare underlying the age 65 agreement and which made necessary the intraunion choice between the competing economic interests of its members were themselves, in substantial part, effects of past racial discrimination by the employer, then the agreement violates Title VII as a present effect of prior employer racial discrimination. It is not shielded by the facts that it is the product of collective bargaining and meets the standards of fair representation imposed by RLA and *Steele*.

In *Taylor v. Armco Steel Corp., et al.*, 429 F.2d 498 (5th Cir. 1970), we were confronted with the dismissal of a complaint brought by black employees alleging that a collectively bargained seniority system being presently enforced by their union and their employer violated Title VII. We reversed and remanded. Eleven years earlier in *Whitfield, et al, v. United Steelworkers of America, et al.*, 263 F.2d 346, *cert. denied*, 360 U.S. 902, 3 L.Ed. 2d 1254 (1959), we had given our blessings to the installation of this system at the Houston plant of Armco, resting our approval of the collectively bargained employment condition on the National Labor

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Ford Motor Co. v. Huffman, 345 U.S. 330, 338, 97 L.Ed. 1048, 1058 (1953):

> "Inevitably differences arise in the manner and degree to which forms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."

Relations Act[17] and *Steele*. Attaching "particular importance to the good faith of the parties in working toward a fair solution,"[18] we found that while the seniority agreement fellshort of cleansing progression lines of past racial discrimination, "they have a contract that *from now on* is free from any discrimination based on race."[19] Yet in *Armco, supra*, Judge Wisdom, the spokesman for the court in *Whitfield*, recognized that while our *Whitfield* decision and the seniority agreement were "defensible" within the context of the NLRA and *Steele*, the seniority agreement still had to be tested under the requirements of Title VII and of the cases finding Title VII violations in the post-Act continuation of the effects of pre-Act racial discrimination by employers.[20]

The point which we made in *Armco*, and the grounds upon which we reject the Railroad's argument here, are not new to Missouri-Pacific. In *Norman v. Missouri-Pacific R.*, 414 F.2d 73 (8th Cir. 1969), one of the cases we relied upon in *Armco*, the Eighth Circuit held that a prior determination under the RLA upholding the terms and conditions of employment then being challenged under Title VII by black employees, did not prevent the employees' complaint from stating a cause of action under Title VII against Missouri-Pacific. *See*

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[17]The NLRA has been construed to impose a statutory duty of fair representation equivalent to that which Steele v. Louisville & Nashville R. Co., B.L.F.&E., etc., 323 U.S. 192, 89 L.Ed. 173 (1944), held to be imposed by the RLA. See Vaca v. Sipes, 386 U.S. 171, 177, 17 L.Ed. 2d 842, 850 (1967).

[18]263 F.2d at 551.

[19]*Id.* (emphasis in original).

[20]See, *e.g.*, Local 189, United Papermakers, etc., v. U.S., 446 F.2d 980 (5th Cir. 1969).

also Tiples v. E. I. DuPont deNemours & Co., 443 F.2d 125 (6th Cir. 1971); *Hutchings v. U.S.*, 428 F.2d 303 (5th Cir. 1970); *Robinson v. Lorillard Corp.*, 444 F.2d 791 (1971), and *Glus v. G. C. Murphy Corp.*, 329 F. Supp. 563 (W.D. Penn. 1971).

Even if the Railroad's intent in agreeing to and enforcing the challenged employment agreement was a racially neutral, or even benevolent, desire to discharge its legal duty to bargain with the plaintiffs' representative and to enforce the contract entered into, such intent does not save the agreement from the terms of Title VII if it operates to "freeze" the status quo of prior discriminatory employment practices. In *Griggs, supra*,[21] the Supreme Court reshaped the statutory concept of discrimination in terms of consequence rather than motive, effect rather than purpose, to make clear that Title VII requires more of an employer who has discriminated in the past than present and future equal

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[21]The District Court in the present case made its findings and conclusions of law and granted judgment for plaintiffs prior to the Supreme Court decision in *Griggs*, whose importance to the legal definition of employer discrimination violative of Title VII and the correctness of the judgment below is recognized by the parties. While the District Court's determination might be phrased differently from the ones it could make now using *Griggs*, our concern here is whether plaintiffs have proven that which must be shown to establish their right to relief and whether defendant has shown anything which constitutes a defense under the present construction of Title VII exhibited by *Griggs*. We recognize, for example, that the Railroad's collective bargaining argument discussed above might be rephrased after *Griggs* as an attempt to establish a "business necessity" defense for the different retirement ages of black and white firemen. What we have said here, however, disposes of that attempt, whatever its verbal formulation. A "business necessity" which is itself the product or the continuation of prior employer discrimination violates Title VII.

treatment of similarly situated employees regardless of their race. Under the mandate of Title VII, such an employer must scrutinize even the steps he now takes with neutral or benevolent motives[22] to determine if they operate as "built-in headwinds"[23] for minority groups and are unrelated to job performance. If they have that operative effect, they contravene Title VII.

We conclude, therefore, that the District Court correctly predicated judgment for plaintiffs on the legal theory that Title VII was violated if the age 65 agreement and its enforcement, irrespective of their collectively bargained origin, were shown to be the continued, present adverse effects of the Railroad's pre-Act, racially discriminatory employment practices.

III.

The District Court did not plainly err in finding that the Railroad had in fact discriminated in the past and that the age 65 agreement adversely affected plaintiffs and was the present effect of the employer's past discrimination. We emphasize the interplay of several factors supporting the court's determinations.

Notwithstanding what the motives of IARE or Local 3 had been in initially proposing the age 65 plan for bargaining in 1958, the testimony of President Whitaker evidences that retirement at 65 was proposed and agreed to in 1964 in order to induce the Railroad to eliminate the long standing differentials in pay and

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[22]See Rowe v. General Motors, 457 F.2d 348, 355 (5th Cir. 1972).
[23]Griggs v. Duke Power, 401 U.S. at 432, 28 L.Ed. 2d at 165.

benefits which still existed between white and black firemen.[24] Whitaker explained further why it was necessary in 1964 to use collective bargaining about age 65 retirement, rather than some other form of concerted action imposing less of a detriment to older IARE members, as a quid pro quo for the achievement of equality. The white employees of the Railroad and their white-dominated unions had consistently refused to support IARE threats to strike for equality in treatment. Since the black firemen had been geographically segregated by the Railroad, they belonged to different bargaining units than the white firemen. Hence, the unions representing white firemen were not forced by the RLA and the *Steele* doctrine to fairly represent and support equally the interests of the blacks.

But Award 282, Whitaker testified, gave the black firemen and IARE the first intrinsic bargaining strength they ever enjoyed. Award 282's terms would not become effective until its provisions had been adopted and included in the individual collective bargaining agreements existing between the railroads and the unions representing the nation's firemen. Moreover, Missouri-Pacific would be able to materially reduce its labor requirements on the DeQuincy Division under Award 282 only through the retirement route, substantially all the black firemen there having more than 10 years in service and average monthly wages in excess of $200.[25] The Railroad, then, needed the adoption

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[24]The record fully supports, and the District Court found, that these differentials had been imposed on the black firemen because of their race.

[25]Jobs of such firemen were protected under the Award.

of 282 and the earlier retirement of plaintiffs to achieve the relief from featherbedding potentially permitted under the Award. And, retirement at age 65 and the early application of Award 282 to their group became the price which the black firemen, younger and older, had to pay and the only "tender" they possessed (given their lack of other kinds of traditional bargaining strength) which they could offer in purchase of the equal treatment that but for the past racial discrimination they would have already enjoyed. As the stipulated facts disclose, once the black firemen were represented by the same union representing white firemen and enjoyed the bargaining power which derived from the duty of fair representation imposed by the RLA on their new representative, the Railroad agreed to eliminate the age 65 agreement and to treat black firemen equally in terms of retirement age.[26]

IV. Damages and attorney fees.

The Railroad claims that the back pay damages awarded plaintiff Placide duplicate in part damages previously awarded him for loss of wages in an earlier suit against the Railroad for personal injuries suffered on the job. The burden was upon the Railroad to establish its plea of estoppel by the prior state judgment.

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[26]Because of our conclusion of law in Part II that the employer may be liable under Title VII even if the union has fairly represented the interests of the plaintiffs in terms of the RLA and *Steele* doctrine, we need not reach the issue of whether, prior to the Railroad's execution of the retirement agreement and with the Railroad's knowledge, a majority of the members of Local 3 were opposed to age 65 retirement.

We are not able to say that the District Court erred in finding there was no double recovery.

There is no merit to the Railroad's claim that attorney fees awarded to plaintiffs' counsel were excessive.

The judgment of the District Court is AFFIRMED.

3 Opinion and Order on Petition for Rehearing, June 27, 1973.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-3566

BOYD PETERS, ET AL,
Plaintiffs-Appellees,

versus

MISSOURI-PACIFIC RAILROAD COMPANY,
Defendant-Third Party
Plaintiff-Appellant,

versus

UNITED TRANSPORTATION UNION,
Third Party Defendant.

Appeal from the United States District Court for the Eastern District of Texas

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion April 10, 1973, 5 Cir., 1973, ____ F.2d ____).

(June 27, 1973)

Before WISDOM, THORNBERRY and GODBOLD, Circuit Judges.

GODBOLD, Circuit Judge: The opinion of this court entered April 10, 1973, is modified in the following respects.

(A) On page 5, line 6, the word "hired" is deleted and the word "employed" is substituted therefor.

(B) We delete that part of the opinion beginning at the bottom of page 6 with the paragraph which commences "In 1958 IARE * * *" and continuing through the paragraph ending in the middle of page 8 with the words "* * * Committeeman Stewart of Local 3." In lieu thereof we substitute the following:

In 1958 IARE, by letter, suggested to the Railroad that the mandatory retirement age for the blacks be reduced to 65. But in 1959 most of the railroads in the country served notice on most of the railroad unions under Section 6 of the Railway Labor Act[7] that they wanted to change collective bargaining agreements so as to, in effect, eliminate all firemen on diesel locomotives. The IARE's age 65 request lay dormant while most of the nation's railroads and railroad unions fought over the status of firemen. This national dispute was finally settled in 1963 by Award 282 of a board of arbitration established by Congress. See Pub. L. No. 88-108, § 2, 77 Stat. 132 (Aug. 28, 1963). Award 282 allowed the participating railroads (1) to terminate firemen with less than two years seniority; (2) to terminate firemen with more than two years seniority whose average monthly earnings for the last two years

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[7] 45 U.S.C.A. 151 *et seq.* (1972).

had not exceeded $200; (3) to terminate firemen with more than two years seniority who had not worked in two years; and (4) to "blank", *i.e.*, leave open and unfilled, the jobs of firemen who retired after the effective date of the Award. Firemen who had 10 years seniority and whose average monthly earnings were in excess of $200 were protected by the Award.

The national dispute and Award 282 substantially altered the employment context of the Railroad's firemen by protecting the employment status and opportunities of some but destroying the status and opportunities of others. The Award would materially reduce the labor requirements of the Railroad on its DeQuincy Division, but only after it succeeded in having the terms of Award 282 included in the collective bargaining agreement it had with IARE as representative of the black firemen on that Division.[7A] Thus, in May 1964, the Railroad proposed to IARE, as subjects of collective bargaining, the adaptation and application of the provisions of Award 282 to the black firemen of its DeQuincy Division and the reduction of the mandatory retirement age of the black firemen from 70

[7A] IARE as representative of the black firemen was not a party to the arbitration proceedings that culminated in Award 282. Hence the Railroad had no authority under 282 to unilaterally impose its terms upon the black firemen, and such action would have violated the existing collective bargaining agreement covering these men. IARE and the Railroad had agreed, however, that upon termination of the national dispute and entry of the national board's award, they would enter into negotiations and, using the national award as a pattern, construct an agreement applicable to the black firemen.

to 65. Discussion of these two subjects[8] took place in separate meetings of the Railroad with President Whitaker of IARE and with Chairman Simpson and Committeeman Stewart of Local 3.

(C) We delete the full paragraph on page 9 and in lieu thereof substitute the following:

Award 282 affected equally the Railroad's black and white firemen who fell into these groups: those with less than two years seniority, those who had earned less than $4800 for the last two years, and those who had not worked at all in two years. Nevertheless, the interaction of 282 with the age 65 retirement agreement, once the latter became effective, placed an additional burden upon the black firemen. When the older black firemen were forced to retire, their jobs were "blanked" and no new blacks hired to replace them.[10] This reduction in firemen's jobs held by blacks was accomplished without a corresponding elimination of firemen's jobs held by whites since white firemen, generally, were not forced to retire until age 70. Although blacks were being required to retire at age 65 on pensions, the court found that the black retirees were no less competent for firemen's jobs than their white counterparts.

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[8]Other conditions of employment, including the disparity between the pay scales and fringe benefits of white and black firemen, were discussed as well.

[10]The parties stipulated that the effect of the age 65 agreement was to reduce the number of black firemen employed by the Railroad.

(D) We delete the paragraph beginning on page 18 and continuing to the middle of page 19, and in lieu thereof substitute the following:

But Award 282, Whitaker testified, gave the black firemen and IARE the first intrinsic bargaining strength they ever enjoyed. Award 282's terms would not become effective on the DeQuincy Division until its provisions had been adopted and included in the collective bargaining agreement existing between the Railroad and IARE. Moreover, the Railroad would be able to materially reduce its labor requirements on the DeQuincy Division under Award 282 only through the retirement route, substantially all the black firemen there having more than 10 years in service and average monthly wages in excess of $200.[25] The Railroad, then, needed the adoption of 282 and the earlier retirement of plaintiffs to achieve the relief from featherbedding potentially permitted under the Award. Retirement at age 65 and the "blanking" of jobs held by black firemen forced to retire at 65 became the price which the black firemen, younger and older, had to pay and the only "tender" they possessed (given their lack of other kinds of traditional bargaining strength) which they could offer in exchange for the equal pay and benefits that but for the past racial discrimination they would have already enjoyed. No such surrender was necessary for white firemen who, generally, were permitted to work to age 70.[25A] As the

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[25]Jobs of such firemen were protected under the Award.

[25A]The Railroad contends that black and white firemen are not fairly comparable classes. Its reasoning, while not entirely clear, appears to run this way. Most of the white firemen

stipulated facts disclose, once the black firemen were represented by the same union representing white firemen and enjoyed the bargaining power which derived from the duty of fair representation imposed by the RLA on their new representative, the Railroad agreed to eliminate the age 65 agreement and to treat black firemen equally in terms of retirement age.[26]

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became engineers and left firemen ranks before reaching age 65 because they had accepted a rule making them eligible for promotion to engineer if they passed engineer tests. The black firemen on the DeQuincy Division, however, had declined to accept an equivalent promotion rule and thus continued in service as firemen until death or retirement. For purposes of discussion we accept these premises as correct, although the second is disputed. [For the history of varying treatment of black and white firemen concerning promotability, *see* Graham v. B.L.F.&E., 338 U.S. 232, 233, 94 L.Ed. 22, 26 (1949); Steele v. Louisville & Nashville R. Co., B.L.F.&E., etc., 323 U.S. 192, 195, 89 L.Ed. 173, 179 (1944); Mitchell v. Gulf, Mobile & Ohio R. Co., 91 F. Supp. 175 (N.D. Ala. 1950), *modified and aff'd*, 190 F.2d 308 (5th Cir. 1951); and Rolax v. Atlantic Coast Line R. Co., 186 F.2d 473 (4th Cir. 1951), *rev'g*, 91 F. Supp. 585 (E.D. Va. 1950).] However, testimony of the Railroad's labor relations officer, Claude Courtway, revealed that there were "a number" of white firemen not promotable to engineer who, nevertheless, were eligible to remain in defendant's employ as firemen until mandatorily retired at age 70. The black firemen were entitled to be treated, with regard to compulsory retirement age, equally as well as these similarly situated white firemen. Also, the failure of blacks to avail themselves of an opportunity to move out of their class would not confer upon the Railroad immunity from the consequences of discriminatory action against those choosing to remain in the class.

[26]Because of our conclusion of law in Part II that the employer may be liable under Title VII even if the union has fairly represented the interests of the plaintiffs in terms of the RLA and *Steele* doctrine, we need not reach the issue of whether, prior to the Railroad's execution of the retirement agreement and with the Railroad's knowledge, a majority of the members of Local 3 were opposed to age 65 retirement.

The petition for rehearing filed by Missouri-Pacific Railroad Company is DENIED, and no member of this panel nor Judge in regular active service on the court having requested that the court be polled on rehearing en banc, (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

Appendix C: The Opinions and Decree of the District Court in this case.

1 Findings of Fact and Conclusions of Law filed February 17, 1970.

IN THE

United States District Court

FOR THE EASTERN DISTRICT OF TEXAS

MARSHALL DIVISION

Civil Action No. 1325

BOYD PETERS, ET AL,
Plaintiffs,

versus

MISSOURI-PACIFIC RAILROAD COMPANY,
Defendant

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On the 12, 13 and 14 day of November, 1969, this cause came on for hearing before the court, and after considering

the pleadings, stipulations, testimony and briefs herein, the court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

(1) Defendant, Missouri Pacific Railroad Company, is an employer as defined in 42 U.S.C.A. 2000(e).

(2) Plaintiffs are members of the Negro race, and were employed as firemen by defendant in its DeQuincy Division, and as of December 31, 1966, had seniority as follows:

Robert Leroy Patterson — September 17, 1917
Grover C. Rugeley — November 13, 1922
M. D. Marsland — June 2, 1926
Augustus Placide — October 21, 1937
Nicholas Johnson Emanuel — October 22, 1943
Boyd Peters — May 18, 1944

(3) Plaintiffs Peters, Patterson, Placide, Emanuel and Rugeley were required to retire on January 4, 1967, by defendant on the grounds that they had attained the age of sixty-five years prior to that date, and the plaintiff Marsland was required to retire by defendant as of October 8, 1968, on the ground that he had attained the age of sixty-five years prior to that date.

(4) Plaintiffs Patterson, Rugeley, Emanuel and Peters timely filed a complaint with the Equal Employment Opportunity Commission, after they were required to retire. It is not contested by defendant in this case that all of the various administrative steps set forth in the Civil Rights Act of 1964 and the regulations of the Commission were complied with by these plaintiffs.

(5) Plaintiffs Placide and Marsland have not filed a complaint with the Equal Employment Opportunity Commission with regard to the subject matter of this suit. However, plaintiffs Placide and Marsland held seniority on the same roster, and were required to retire in the same manner as the other plaintiffs herein, that is, on the basis that they had attained the age of sixty-five years, in accordance with

the agreement of June 26, 1964, between defendant Missouri Pacific Railroad Company and the International Association of Railway Employees ("IARE").

(6) Defendant Missouri Pacific Railroad Company was served with notice of the nature of the charges filed with the Equal Employment Opportunity Commission by plaintiffs Patterson, Peters, Emanuel and Rugeley on August 9, 1967. These charges set forth in detail the basis of the complaint against defendant, and were adequate to give notice to defendant that such plaintiffs were complaining that the age sixty-five retirement agreement dated June 26, 1964, was racially discriminatory and an unlawful employment practice under the terms of Title VII of the Civil Rights Act of 1964.

(7) Plaintiffs Patterson, Rugeley, Emanuel and Peters filed this action within thirty days after the receipt of the notice that the efforts of the Commission to obtain voluntary compliance with the provisions of the Civil Rights Act of 1964 through conciliation were unsuccessful.

(8) The plaintiffs were required to retire pursuant to the provisions of a collective bargaining agreement between the IARE and defendant Missouri Pacific Railroad dated June 26, 1964, and effective December 31, 1966. The plaintiffs do not challenge in this proceeding the validity of this agreement under the provisions of the Railway Labor Act, but assert solely that this agreement and the enforcement thereof was unlawful under the provisions of Title VII of the Civil Rights Act of 1964.

(9) Prior to 1964, the International Association of Railway Employees was a segregated union whose membership was restricted to negroes. Between 1916 and 1956, all of the locomotive firemen employed by either the New Orleans, Texas and Mexico Railway Company, the Beaumont, Sour Lake and Western Railway Company, and the New Iberia and Northern Railroad Company, were negroes. As of 1944, these firemen were represented for collective bargaining purposes by the IARE.

(10) In 1956, the New Orleans, Texas and Mexico Railway Company, the Beaumont, Sour Lake and Western Railway Company, and the New Iberia and Northern Railroad Company were merged into the Missouri Pacific Railroad Company, and ceased to exist as separate corporations. The rates of pay, rules, and working conditions of the locomotive firemen who had been in the employ of the separate railroad companies prior to the merger remained in effect, and were adopted by the Missouri Pacific Railroad Company. The IARE continued to be the representative for collective bargaining purposes of the employees that it had represented immediately before the merger. This included the negro locomotive firemen in what became the DeQuincy Division of the Gulf District of the Missouri Pacific Railroad Company.

(11) Prior to 1964, the Brotherhood of Locomotive Firemen and Enginemen ("BLF&E") and the Brotherhood of Locomotive Engineers ("BLE") were segregated unions which restricted their memership to members of the Caucasian race. Prior to 1968, all white locomotive firemen employed by defendant on its Gulf District were represented by either the BLF&E or the BLE, and these unions represented no negroes employed by defendant on its Gulf District.

(12) Prior to 1956, there was no compulsory retirement provisions covering any firemen employed by defendant. On July 24, 1956, an agreement was entered between defendant and the IARE providing for retirement at age seventy of the negro firemen in the DeQuincy Division. This age limit was lowered to age sixty-five by an agreement between IARE and defendant on June 26, 1964, which was to become effective December 31, 1966.

(13) The white firemen employed by defendant had no compulsory retirement age prior to 1959. Part of these white employees were covered by an agreement entered into on October 8, 1959, and the remainder of them by an agreement entered into February 1, 1962, with both of these agreements providing for mandatory retirement at age seventy. The

retirement age of the white locomotive firemen employed by defendant on its Gulf District has remained at age seventy years until the present date.

(14) On May 15, 1968, after an election, the National Mediation Board certified the BLF&E as the representative for collective bargaining purposes of all firemen, negro and white, employed by defendant on its Gulf District. Thereafter, the BLF&E and certain other labor organizations merged into the United Transportation Union ("UTU"), which therefore now represents defendant's negro firemen who were formerly represented by the IARE.

(15) The retirement age for the negro locomotive firemen continued to be sixty-five years until June 23, 1969, when after this suit was filed, a new agreement was made by the UTU with defendant Missouri Pacific Railroad Company, whereby the retirement age of the negro locomotive firemen was again raised to age seventy years. Since that date, the retirement age for negro locomotive firemen corresponds with the retirement age for white locomotive firemen employed by defendant.

(16) Prior to the Civil Rights Act of 1964, defendant, with the aid and cooperation of the various craft unions, had intentionally classified employees on the basis of race by hiring only negroes to work as firemen in its DeQuincy Division, and further by hiring only whites as firemen on defendant's other districts and properties. The situation whereby the IARE represented only negro firemen in the DeQuincy Division was a direct result of this earlier discrimination and racial classification of defendant's employees. The policy and practice of defendant in this regard can be traced in origin to the period where the railroad or the conductor owned the negro slaves who performed the work of firemen. Down through the years, the railroad continued to hire and work the negro firemen as a separate group or class, and with the advent of the Railway Labor Act the negro firemen were required to organize as a separate group due to the segregation policies of the white unions, coupled with the employment practices of the railroad. The collective

bargaining agreement which was entered into in 1944 with the predecessors of this defendant, and which is still in effect today, designates or defines the group to which it will apply as the "Colored Firemen". Until the effective date of the Civil Rights Act of 1964, the employees so classified as "Colored Firemen" received inferior pay rates, were required to work longer hours, received shorter vacations, and inferior welfare and fringe benefits than their white counterparts employed by defendant. The particular bargaining unit involved in this case was composed of negro firemen only, and included all negro firemen employed by defendant, as a direct result of the prior actions and policies of defendant in separating, segregating, and classifying its employees on the basis of race.

(17) The differences in the mandatory retirement age for white and negro firemen about which plaintiffs complain are the result of the discriminatory hiring policies of defendant Missouri-Pacific Railroad Company prior to 1964.

(18) The practical effect of the retirement agreement of June 26, 1964, was to treat negro firemen differently from white firemen, by requiring them to retire some five years earlier.

(19) At the time plaintiffs were required to retire at age sixty-five, no white firemen employed by defendant was required to retire by any collective bargaining agreement or otherwise at an age of less than seventy years. Furthermore, no negro fireman employed by defendant was permitted to continue to work after the age of sixty-five years.

(20) A direct effect of the retirement agreement of June 26, 1964, between the IARE and defendant was to reduce the number of negro firemen employed by defendant. However, this retirement agreement of June 26, 1964, between the IARE and defendant did not affect or reduce the number of white firemen employed by defendant.

(21) At no time between June 26, 1964, and the date of the institution of this action did defendant enter into any agreement with any collective bargaining representative

which would reduce the mandatory retirement age for white firemen below the age of seventy years.

(22) There exists no valid business or economic basis for distinguishing between negro and white firemen with respect to retirement age. A fireman over the age of sixty-five years is not less qualified to perform the duties of his employment if he is negro rather than white.

(23) There is no business or economic basis for retiring firemen in the DeQuincy Division at an earlier age than firemen on defendant's other districts or properties. Negro firemen are as well qualified to perform their tasks as white firemen. The duties of all firemen, negro and white, are substantially similar over the entire country, and negro and white firemen run overlapping routes in defendant's Gulf District, have frequently worked the same train, and on occasion will substitute for one another.

(24) Defendant's classification of employees on the basis of race resulted in the deprivation to plaintiffs of their opportunities for employment.

(25) Defendant's classification of employees on the basis of race had the result of adversely affecting plaintiffs' status as employees.

(26) Defendant discriminated because of race against plaintiffs with respect to the terms and conditions of their employment.

(27) Defendant classified its employees because of race in a way which operated to deprive or tend to deprive plaintiffs of their employment opportunities and adversely affected their status as employees.

(28) The actions of defendant in entering into the retirement agreement of June 26, 1964, and subsequently enforcing this agreement with respect to plaintiffs, was not accidental, haphazard, or the result of inadvertence.

(29) Defendant entered into the retirement agreement of June 26, 1964, with the I.A.R.E. with full knowledge and

appreciation of the fact that it had the effect of reducing the number of negro firemen, and further that it would result in white firemen being permitted and able to retain their employment and means of livelihood for five years more than their negro counterparts.

(30) Defendant, prior to entering or enforcing the retirement agreement in queŝtion, had knowledge that the majority of the membership of Local No. 3 of the I.A.R.E., which were the negro locomotive firemen affected by this agreement, opposed the reduction of the mandatory retirement age from seventy to sixty-five years, and had attempted to impeach their General Chairman as a result of his participation in the negotiations and signing of this agreement.

(31) Defendant, Missouri Pacific Railroad, by entering into and enforcing the retirement agreement of June 26, 1964 with the I.A.R.E. meant to do what this agreement actually accomplished, that is, the employment practice of the defendant in this respect was not accidental.

(32) Although the racial implications of the retirement agreement of June 26, 1964, were known to defendant from its inception, nevertheless, even after defendant had been served with notice of the nature of the charges filed with the EEOC, it persisted in its conduct with regard to applying and enforcing this agreement.

CONCLUSIONS OF LAW

(1) This court has jurisdiction of the subject matter of this case pursuant to 42 U.S.C.A. 2000(e)-5(f), and venue is properly laid in this Division of this District.

(2) Plaintiffs Placide and Marsland are properly joined as co-plaintiffs in this case. *Oatis v. Crown Zellerbach Corporation*, 398 F. 2d 496 (5th Cir. 1968); *Jenkins v. United Gas*, 400 F. 2d 28 (5th Cir. 1968); *Local 186 v. Minnesota Mining & Mfg. Co.*, ____ F. Supp. ____ (N.D. Ind., June 2, 1969).

(3) Plaintiffs Placide and Marsland have standing and are entitled to seek affirmative relief in the form of back pay and reinstatement under the provisions of 42 U.S.C.A. 2000(e)-5(g). *Bowe v. Colgate-Palmolive Co.*, 416 F. 2d 711 (7th Cir. 1969); *Madlock v. Sardis Luggage Co.*, 302 F. Supp. 866 (N.D. Miss. 1969); *Quarles v. Phillip Morris Tobacco Co.*, 279 F. Supp. 505 (E.D. Va. 1968); *Local 186 v. Minnesota Mining & Mfg. Co.*, ... F. Supp. ..... (N.D. Ind., June 2, 1969).

(4) This suit is not barred by any of the statutes of limitations of the state of Texas. Title VII of the Civil Rights Act of 1964 contains its own prescription, which requires that suit be instituted within thirty days after receipt of notice by the aggrieved individual that the Equal Employment Opportunity Commission has been unsuccessful in attempting to obtain compliance with conciliation. 42 U.S.C.A. 2000(e)-5(e); *Miller v. International Paper Co.*, 408 F. 2d 283 (5th Cir. 1969); *Pullen v. Otis Elevator Co.*, 292 F. Supp. 715 (N.D. Ga. 1968); *Choate v. Caterpillar Tractor Co.*, 402 F. 2d 357 (7th Cir. 1968); *Culpepper v. Reynolds Metals Co.* .....F. 2d ..... (5th Cir., No. 27547, Jan. 8, 1970). The Supremacy Clause thus prohibits the application of any state statute of limitation. Alternatively, if the Texas Statute of Limitations is applicable, the court is of the opinion that this action was timely filed within the period prescribed by such statute, inasmuch as plaintiffs' cause of action did not accrue until the date of their retirement, or not earlier than January 4, 1967.

(5) The actions of defendant in entering into and enforcing the retirement agreement of June 26, 1964, with the I.A.R.E., which had the effect of requiring Negro locomotive firemen to retire at an age five years earlier than white locomotive firemen, constituted an unlawful employment practice in violation of 42 U.S.C.A. 2000(e)-2(a), in the following respects:

(a) Defendant's classification of its employees on the basis of race resulted in the deprivation to plaintiffs of their employment opportunities.

(b) Defendant's classification of its employees on the basis of race had the result of adversely affecting plaintiffs' status as employees.

(c) Defendant discriminated on the basis of race against plaintiffs with respect to the terms and conditions of their employment.

(d) Defendant classified its employees because of race in a way which operated to deprive or tend to deprive plaintiffs of their employment opportunities, and otherwise adversely affected their status as employees.

(e) The retirement agreement carried forward into the present and the future effects of the prior racially discriminatory employment practices of defendant.

(f) The retirement agreement of June 26, 1964, established a seniority system and conditioned present and future employment rights on a previously established, pre-determined racial classification or status. *Local 189, United Paper Makers and Paper Workers, and Crown Zellerbach Corporation v. U.S.A.*, 416 F. 2d 980 (5th Cir. 1969); *Quarles v. Phillip Morris*, 279 F. Supp. 505 (E.D. Va. 1968); *Dobbins v. IBEW*, 292 F. Supp. 413 (S.D. Ohio, 1968) *Norman v. Missouri Pacific RR. Co.*, 414 F. 2d 73 (8th Cir. 1969); *Local 53 v. Vogler*, 407 F. 2d 1047 (5th Cir. 1969); *U.S.A. v. Sheet Metal Workers Local No. 36*, 416 F. 2d 123 (8th Cir. 1969); *U.S.A. v. Hayes International Corp.*, 415 F. 2d 1038 (5th Cir. 1969); *U.S.A. v. Georgia Power Co.*, 301 F. Supp. 538 (N.D. Ga. 1969); *Griggs, et al. v. Duke Power Co.*, F. 2d (4th Cir., No. 13,013, Jan. 9, 1970).

(6) Defendant's engagement in the unlawful employment practice referred to in the preceding paragraph was intentional, as that term is defined under the Civil Rights Act of 1964. *Local 189, United Paper Makers and Paper Workers, and Crown Zellerbach Corporation v. U.S.A.*, supra; *Quarles v. Phillip Morris, supra.* Plaintiffs are, therefore, entitled to injunctive relief in accordance with 42 U.S.C.A. 2000(e)-5(g), including back pay, and reinstatement with seniority where the individual employee has not attained the age of seventy years prior to the entry of the final decree herein.

(7) The amount of damages, the attorneys' fees, and the nature of the specific relief to be afforded to each individual plaintiff will be determined after an appropriate hearing and the presentation of relevant evidence, unless such matters can be agreed upon by and between various parties in this action.

SIGNED and ENTERED this 17th day of February, 1970.

/s/ Wm. Wayne Justice
United States District Judge

2 Amendment to Findings of Fact and Conclusions of Law, filed March 2, 1970.

IN THE

United States District Court

FOR THE EASTERN DISTRICT OF TEXAS

MARSHALL DIVISION

Civil Action No. 1325

BOYD PETERS, ET AL,
Plaintiffs,

versus

MISSOURI-PACIFIC RAILROAD COMPANY, ET AL,
Defendants.

ORDER

On the 25th day of February, 1970, came on to be heard Defendant MISSOURI-PACIFIC RAILROAD COMPANY'S MOTION TO AMEND FINDINGS OF FACT AND CONCLUSIONS OF LAW in the captioned cause, and the Court being of the opinion that the same should be granted, it is hereby ORDERED that:

The Court's Findings of Fact and Conclusions of Law are hereby amended to include the following paragraph in addition to all paragraphs contained in the Findings of Fact and Conclusions of Law as originally filed:

"8. The Court is of the opinion that the Order containing the findings of fact and conclusions of law of the Court herein involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from such order may materially advance the ultimate termination of the litigation."

To which Order of the Court the Plaintiffs except.

SIGNED and ENTERED this 2nd day of March, 1970.

/s/ WM. WAYNE JUSTICE

United States District Judge

3 Findings of Fact and Conclusions of Law, filed February 17, 1971.

IN THE

United States District Court

FOR THE EASTERN DISTRICT OF TEXAS

MARSHALL DIVISION

Civil Action No. 1325

BOYD PETERS, ET AL,

versus

MISSOURI-PACIFIC RAILROAD COMPANY

FINDINGS OF FACT

1. All facts stipulated by the parties prior to and during the trial of this law suit are incorporated into and made a part of these findings.

2. The court finds that each of the plaintiffs was unable to work during the following periods:

(a) Plaintiff Patterson was unable to work from January 1, 1967, to April 6, 1967, and again from September 5, 1967, to April 1, 1968, or for a total of ten months.

(b) Plaintiff Marsland was unable to work for approximately two weeks in 1970.

(c) Plaintiff Emanuel was unable to work for approximately two weeks in 1967.

(d) Plaintiff Placide was disabled by reason of injuries and was unable to work from January 1, 1967, to August 1, 1968, a period of 19 months.

(e) Plaintiff Rugeley was unable to work from February 24, 1967, to January 25, 1968, a period of 11 months.

(f) Plaintiff Peters was unable to work for a period of 9 months, from April 14, 1967, to January 11, 1968.

3. In the exercise of due diligence, plaintiffs were unable to earn any significant monetary amounts nor were they

able to secure gainful employment of any significant nature in an attempt to mitigate the wage loss suffered by each subsequent to being wrongfully removed from the seniority roster by the defendant.

4. As of February 1, 1971, the amounts due to each of the plaintiffs as back wages are as follows:

(a) Patterson $9,177.93

(b) Rugeley $8,264.28

(c) Marsland $30,293.47

(d) Emanuel $35,280.61

(e) Peters $17,502.06

5. Plaintiff Placide's recovery in *Placide v. Missouri-Pacific Railroad Co.*, No. 722,049, 151st District Court, Harris County, Texas, was based on the age 65 retirement agreement then in force with the defendant railroad. As a consequence, the jury award in that case compensated Plaintiff Placide for lost wages only up to the then mandatory retirement age of 65 years. No compensation has been made to this plaintiff for wages lost from that time to the present.

6. The amount due to Plaintiff Placide for loss of wages due to the application of age-65 retirement agreement in *Placide v. Missouri-Pacific Railroad Co.* is $36,776.92.

7. Plaintiffs are entitled to interest at the legal rate of 6% per annum on the amount of wages found to be due to the plaintiffs, from the date such wages became due until the date of final judgment.

8. The amount of $44,000.00 represents reasonable compensation to the plaintiffs' attorneys for their services to the date of judgment in this case, and such amount shall be assessed against the defendant as costs in this case.

9. Plaintiffs are entitled to recover as costs the reasonable expenditures incurred by plaintiffs' attorneys in the preparation and trial of this case, including:

(a) clerk's filing fee

(b) docketing fee pursuant to Title 28, U.S.C.A. Section 1923

(c) marshal's fees and expenses

(d) reporters' fees for copy of portions of the transcript

(e) deposition expenses

(f) witness fees

(g) printing and reproduction costs

(h) travel and incidental expenses involved in the investigation and preparation for the trial of this civil action

This court will maintain jurisdiction of this case for the purpose of determining the precise amounts due to plaintiffs in respect to court costs.

CONCLUSIONS OF LAW

1. During the periods of time in which each plaintiff has been found to be unable to work, no back wages are due or owing by defendant as damages in this civil action.

2. Plaintiff Placide is not estopped to assert a claim for damages in this cause by reason of the final judgment rendered in a personal injury case brougnt under the Federal Employers' Liability Act, styled *Placide v. Missouri-Pacific Railroad Co.*, No. 722,049, 151st District Court, Harris County, Texas. Such judgment was rendered on the basis of the mandatory age-65 retirement agreement determined by this court to be discriminatory and therefore invalid. Accordingly, plaintiff Placide is entitled to back wages in this case which will compensate him for wages lost from the time he reached age 65 up to the normal retirement age of 70 years.

3. Plaintiffs are entitled to interest at the legal rate of 6% per annum on the amount of wages found to be due to the plaintiffs, from the date such wages became due until

the date of final judgment.

4. Plaintiffs are entitled to interest at the rate of 6% per annum from the date of judgment until paid, on all amounts awarded as back pay, interest and attorneys' fees in this case.

5. Defendant railroad is not entitled to offset or credit against the award of back pay any amount received by the plaintiffs from any collateral source.

6. Plaintiffs Marsland and Emanuel are entitled to immediate reinstatement to their positions of employment with the defendant, with all seniority and rights and privileges as they would have had had they not been wrongfully retired by the defendant.

SIGNED and ENTERED this 17th day of February, 1971.

/s/ Wm. Wayne Justice

United States District Judge

4 Final Judgment and Decree, filed June 24, 1971.

IN THE

United States District Court

FOR THE EASTERN DISTRICT OF TEXAS

MARSHALL DIVISION

Civil Action No. 1325

BOYD PETERS, ET AL,
Plaintiffs,

versus

MISSOURI-PACIFIC RAILROAD COMPANY,
Defendant.

FINAL JUDGMENT AND DECREE

In accordance with the findings of fact and conclusions of law heretofore filed by this Court on February 17, 1970, and February 17, 1971, and for the reasons set forth in said findings and conclusions, the Court is of the opinion and finds that the Plaintiffs are entitled to relief of and from the Defendant herein, and it is, therefore,

ORDERED, ADJUDGED and DECREED that the Plaintiffs have and recover from the Defendant Missouri-Pacific Railroad Company the following amounts as back wages as of February 1, 1971:

a) Patterson — $9,177.93

b) Rugeley — $8,264.28

c) Marsland — $30,293.47

d) Emanuel — $35,280.61

e) Peters — $17,502.06

f) Placide — $36,776.92

It is further ORDERED, ADJUDGED and DECREED that the Plaintiffs shall have and recover of and from the Defendant Missouri-Pacific Railroad Company the following amounts respectively as interest on the amount of back wages due to each of the Plaintiffs from the date such wages became due until February 17, 1971:

a) Patterson — $1,582.70

b) Rugeley — $1,709.02

c) Marsland — $2,364.51

d) Emanuel — $4,348.31

e) Peters — $2,707.18

f) Placide — $5,801.44

It is further ORDERED and DECREED that the Plaintiffs Emanuel and Marsland shall be reinstated to their positions of employment with the Defendant Missouri-Pacific Railroad Company as of February 1, 1971, with all seniority and rights and privileges unimpaired as they would have had had they not been wrongfully retired, and it is further ORDERED and DECREED that the Defendant United Transportation Union shall not interfere in any manner with the carrying out or enforcement of the requirements of this judgment by the Defendant Missouri-Pacific Railroad Company.

It is further ORDERED, ADJUDGED and DECREED that the firm of Jones, Jones & Baldwin shall have and recover of and from the Defendant Missouri-Pacific Railroad Company the

sum of $44,000.00 as reasonable compensation for their services as attorneys for the Plaintiffs through and including the date of judgment herein.

It is further ORDERED, ADJUDGED and DECREED that the Plaintiffs and their attorneys shall have and recover of and from the Defendant Missouri-Pacific Railroad Company interest at the rate of six percent (6%) per annum on all amounts awarded as back pay, interest and attorneys' fees as set forth in this judgment, from the date of February 17, 1971, until paid.

It is further ORDERED, ADJUDGED and DECREED that the Plaintiffs shall have and recover of and from the Defendant Missouri-Pacific Railroad Company as costs the reasonable expenditures incurred by the Plaintiffs' attorneys in the preparation and trial of this case, including:

a) Clerk's filing fee

b) Docketing fee pursuant to 28 U.S.C.A. 1923

c) Marshall's fees and expenses

d) Reporters' fees for copies of portions of the transcript

f) Witness fees

g) Printing and reproduction costs

h) Travel and incidental expenses involved in the investigation and preparation for the trial of this civil action.

This Court will maintain jurisdiction of this case for the purpose of determining the precise amounts due to the Plaintiffs with respect to court costs in the event that the parties are not able to agree upon the same.

SIGNED and ENTERED this 24th day of June, 1971.

/s/ Wm. Wayne Justice

United States District Judge

APPENDIX D

Excerpts from the Report to the President, dated February 26, 1962, by the Presidential Railroad Commission, which was established by Executive Order 10891, dated November 1, 1960:

Chapter 3: Manpower in the Railroad Industry: Operating Employees

* * * * *

In 1959, 22 per cent of all employed engineers (and nearly 25 percent of the road engineers) were 65 years of age or over, and more than 5 percent were 70 years old or over. Only 3.7 percent of the firemen-helpers were over 65, and less than 1 percent were over 70. (Page 50).

* * * * *

Under the Railroad Retirement Act, railroad employees are eligible to retire with full benefits at age 65 after ten years of service. However, the average retirement age has risen from 64.3 in 1951 to 66.5 in 1959. The average retirement age in 1959 for various classes of employees was:

Road Engineers	68.3	
Yard Engineers	67.5	
Hostlers and hostler-helpers	66.5	
Road firemen-helpers	65.7	
Yard firemen-helpers	65.0	(Page 53)

* * * * *

4. In order to facilitate orderly adjustment to the declining manpower requirements for operating employees, the parties should negotiate a new national retirement rule, effective July 1, 1962 1/(a) that all operating employees who are 70 years of age or over should retire, except that no employee in the employ of the carrier shall by virtue of this new rule be required to retire sooner than July 1, 1963, and (b) that the mandatory retirement age shall thereafter be progressively lowered until it is 65, effective July 1, 1967, in accordance with the following schedule.

July 1, 1963 — 69 years of age
July 1, 1964 — 68 years of age
July 1, 1965 — 67 years of age

July 1, 1966 — 66 years of age
July 1, 1967 — 65 years of age (Pages 59, 60)

* * * * *

Chapter 4. The Use of Firemen-Helpers.

There have been firemen on locomotives on American railroads for more than a century. During the steam locomotive era, their principal work was directly related to the production of power to propel the locomotive. With the advent of the diesel locomotive, the traditional "firing" duties disappeared. Since 1937, however, a national rule has required the use of firemen on virtually all freight and yard diesel and electric locomotives, as well as on passenger locomotives. (Page 61).

* * * * *

h. The conclusion of this review of the mechanical duties now performed by firemen-helpers on road freight and yard diesels is that they involve a small proportion of the total time on duty, are relatively minor, and are not essential to safe operation. The infrequent minor malfunctions which do occur can be handled by the engineer. If they are more serious, the services of skilled maintenance personnel called to handle the emergency will still be required, as at present. (Page 77).

* * * * *

6. Future Source of Engineers.

Engineers have almost universally been promoted from the ranks of firemen who pass qualifying examinations. This fact does not in itself, however, compel the conclusion that the fireman's job should be retained. The engineer is a skilled and responsible operating employee, on whose shoulders rests the primary responsibility for the safe and efficient operation of the locomotive. Passenger firemen, who number 6,000, would remain in any case, and be eligible for promotion to engineer positions on freight and yard diesels, as well as on passenger diesels.

To the extent that present firemen remain or are available for promotion as their seniority permits, there will be replacements for present engineers as attrition reduces their ranks. It is roughly estimated that 27,000 present firemen (over 45 percent of those attached to the indus-

try) are firemen who had seniority dates as promoted engineers on January 1, 1961, although only about 8,000 of these received a substantial amount of engineer's work.

Conclusions

In the light of the preceding analysis, we conclude that firemen-helpers are not so essential for the safe and efficient operation of road freight and yard diesels that there should continue to be either a national rule or local rules requiring their assignment on all such diesels. (Pages 81, 82).

* * * * *

Chapter 5. Training of Engine Service Employees.

...On most railroads, a newly-hired fireman is considered qualified to serve on a yard or road diesel after 3 to 6 student trips. Progressive examinations for promotion to engineer are provided, and these together with on-the-job training are considered by the Carriers as adequate for training future engineers. (Page 93).

* * * * *

Firemen-helpers generally serve about three years before they are eligible for promotion to engineers. Less than 5 percent fail to pass the qualifying examinations which are prerequisite to this promotion; those who fail are separated from the railroad.

...The present qualifications and on-the-job experience of the firemen-helpers with 10 years or more seniority seem entirely adequate to meet needs for engineers for the next several years, at least. In fact, a large number of these senior firemen are already ,'promoted engineers." (Page 94).

Appendix E

Excerpts from the testimony of Charles Stewart
on November 12, 1969.
(From Pages 510-512)

Q Now, Mr. Stewart, isn't it true that at the time that the agreement requiring retirement at the age sixty-five was entered into, there were men on the seniority roster of Local No. 3, colored firemen, who were not working because there were no jobs for them to fill?

A Since the sixty-five year agreement was put into effect?

Q At the date that it was put into effect — December the 31st, 1966.

A And you say there were firemen that couldn't work?

Q Firemen that were not working because there were no jobs for them to work in.

A Well, at certain times. There has always been firemen on the extra board and working extra that couldn't hold a job. That's all the time.

Q Well, isn't it true —

A (Interrupting) Sometimes they used to have as many as twenty-five or thirty firemen — extra firemen on the extra board.

Q Well, at the time that the agreement went into effect, weren't there people who were not being — who were not able to work, not because of physical problems but because there were men with greater seniority who were working and they were unable to get jobs because their seniority had not — wasn't senior enough?

A Well, that's what I'm saying. We've always had that.

Q All right, sir.

A Every yeor they hire men, and then you have a lot of men on the extra board after the busy season that can't hold a job.

Q Now —

A (interrupting) So, they are cut off the board. And then they go to work where they can.

Do you recall —

A (Interrupting) Until they are recalled.

Q Do you recall, sir, when the last time was that a fireman was hired to work in the Dequincy Division of the Missouri Pacific Railroad?

A Oh, it's been a long time now.

Q Wasn't it back in 1954?

A Somewhere back there.

Appendix F

Excerpts from the testimony of Plaintiff Augustus Placide on November 13, 1969
(From Pages 576 and 577)

Q So, the men — the only men who would lose any amount of money by virtue of the agreement are the men who reach the age of sixty-five. Isn't that true?

A That's right.

Q All right.

Now, if these men were retired, isn't it true that the younger men in that Union would thereby become entitled to the jobs that those men had vacated?

A Those younger men?

Q Yes.

A Oh; yes, sir.

Q And so they, then, would be enabled to work more and make more money because of the retirement of the men who had reached the age of sixty-five?
(Pause)

A Well, yes, sir; if they was placed on the regular job that I and the rest of them had.

Q All right.

And at the time that these — that the agreement went into effect, in December — on December the 31st, 1966, is it not true that there were a number of men on the seniority roster of Local No. 3 who were not working a day — not working a day and had not worked a day for about two years?

A Those men were hired —

THE COURT: (interrupting) Answer the question that he asked.

A (continuing) Yes, sir.

Appendix G

Excerpts from the testimony of Carl C. Wiggins on November 13, 1969
(From Pages 616-619)

Q Now, under the contract with — between the Mis-

souri Pacific and the International Association of Railway Employees, did negro firemen receive a lower rate of pay than white firemen employed by the Missouri Pacific?

A That is correct.

Q Did you also, as a negro firemen, receive less fringe benefits or welfare benefits, as they are called?

A That's right.

Q Were there differences also in the vacation agreements?

A Yes; there was.

MR. CRAWFORD: Excuse me.

Your Honor, I feel that in order there be no misunderstanding, that I need to rise to make an objection at this time.

We will agree, but for the limited purposes — that for limited purposes this type of testimony is relevant to this lawsuit. However, we would like to object on the basis that we do not mean to concent to the trying of discrimination on the basis of these distinctions in the past in this lawsuit.

In other words, the pleadings of this case are restricted to discrimination because we retired people at the age of sixty-five, and there is no pleading of discrimination on the basis of receiving less pay, no pleading of discrimination on the basis of receiving less employment benefits of one nature or another; and, therefore, in order that it not be felt that these issues are tried by consent, we object to them unless they are offered for a limited purpose.

MR. ROTH: Your Honor, of course there are no pleadings to cover this because we are about to prove that all of these discriminatory practices have been changed and that they are no longer in effect; and there is no need to try them as an issue in this lawsuit.

But, we do feel like they are vitally — that these obvious acts of prior discrimination are highly relevant to the — for the Court's determination of whether or not

there was a racial discrimination involved in the retirement agreement which is in contest in this suit.

MR. CRAWFORD: As I say, Your Honor, my objection is for the sole purpose of eliminating the possibility of any of these issues to be — being tried by consent.

THE COURT: Very well, the objection is noted and it's overruled.

MR. JONES: We seek no relief on that, Your Honor. I think that will take care of that.

BY MR. ROTH:

Q Now, were changes effected approximately three years ago which eliminated the discrimination between the negro and white firemen with respect to promotional opportunities, vacation and welfare benefits, and wage rates?

A Yes.

(Page 619)

Q Mr. Wiggins, how many men are presently on the extra board?

A One.

(Page 623)

BY MR. CRAWFORD:

Q Now, you have indicated that at the present time there is only one man who is now on the extra board.

A That is correct.

(Page 629-630)

Q You've indicated that prior to the passage of the Civil Rights Act you had no choice of a union.

A That's right.

Q That's your testimony?

A That is correct.

Q All right, sir.
And why was that?

A Well, the — the — the Brotherhood of Locomotive Firemen and Enginemen did not accept negroes; they accepted only the Caucasian race.

Q All right.
Do you have any knowledge whatsoever of the Railroad being the cause, or part of, or any reason for the fact that you had no choice of a union prior to the passage of the Civil Rights Act?

A I wouldn't know.

Q Isn't it true, sir, that the negro men who worked in the — worked on railroads joined the International Association of Railway Employees and some other international unions which represented negroes for their own protection for purposes of collective bargaining?

A Yes.

Appendix H

Excerpts from the testimony given by Claude C. Courtway on November 13-14, 1969.
(From Pages 703-706)

BY MR. CRAWFORD:

Q Now, Mr. Courtway, at the time this agreement was signed, June 26, 1964, was there in effect an agreement between the Missouri Pacific Railroad and any other group of firemen who were not negroes which required them to retire at the age of sixty-five?

A There was; yes, sir.

Q And where was this?

A At Memphis, Tennessee.

Q Will you explain, sir, the —
Was — Was this an agreement which required them to retire immediately at the age of sixty-five or was it a — a gradiated (phonetic) retirement?

A The employees at —

The enginemen at Memphis, Tennessee, constitute a separate bargaining union, and at that time a part of the Brotherhood of Locomotive Firemen and Enginemen. In December, and I do not recall the exact date — but it was in December of 1958 — an agreement was entered into with the Brotherhood of Locomotive Firemen and Enginemen that provided a step-down arrangement to begin in 1959 at age seventy, and step down to age sixty-five.

And the agreement was applicable to both engineers and firemen represented by the Brotherhood of Locomotive Firemen and Enginemen.

And the first date that a man age sixty-five would be required to retire was August 31, 1964.

Q All right.

A Step down from the date it was entered into — 1958, through 1964.

Q So that during the year 1964, the sixty-five mandatory retirement age did go into effect for the men who were a part of that particular bargaining unit?

A That is correct.

THE COURT: Does that situation still obtain?

THE WITNESS: It does; yes, sir. The agreement is in effect today.

(From Pages 708-709)

MR. ROTH: Your Honor, when the offer is made, we intend to object to anything that would — on that list that would pertain to classes of employees other than firemen, because the classes of employees that we have involved in this lawsuit are locomotive firemen. And we feel like there could very well be valid distinctions between other classes or crafts that would justify different retirement conditions and which would not be relevant at all to any issue in this case.

The class of employees that is involved in this case would be firemen only, and we would submit that any other retirement agreements with anybody other than firemen would not be admissible as being irrelevant.

MR. CRAWFORD: Well —

MR. ROTH: (interrupting) And for that reason, Your Honor, Plaintiffs' Exhibit No. 1 included only the firemen — the firemen crafts.

MR. CRAWFORD: We would offer the matter, Your Honor, for the purposes of demonstrating that other retirement ages did exist in other crafts or classes, for whatever that might be worth.

THE COURT: All right, it will be received for that purpose; I mean, for the purpose indicated by your offer.

BY MR. CRAWFORD:

Q All right.

Now, also, Mr. Courtway, were there agreements in effect with other employees, though not necessarily firemen, requiring them to retire at the age of sixty-five at or about the year 1964.

A There was — and there is today.

REPORTER'S NOTE: Instrument then handed to the witness.

Q Let me hand you Defendant's Exhibit No. 13 and ask you if you recognize that exhibit.

(LIST — showing those organizations that have made agreements providing for termination of seniority rights because of age, as prepared by Personnel Department, Missouri Pacific Railroad Company, September 1, 1967, was previously duly marked as: DEFENDANT'S EXHIBIT NO. 13)

REPORTER'S NOTE: Instrument then handed to the witness.

A Yes, sir.

Q All right; will you briefly describe what it is.

A It is a list showing those organizations who have representation on — who represent employees on the Missouri Pacific Railroad, and its subsidiaries that have made agreements providing for the termination of seniority rights because of age.

Q All right.

A I might add, there are agreements entered into with organizations subsequent to September of 1967, when this list apparently was made.

(From Pages 710-711)

THE COURT: (interrupting) Excuse me for a minute.

MR. CRAWFORD: Yes.

THE COURT: This agreement that you were talking

about in 1959 — was that with the firemen — you were talking about some kind of agreement in Memphis, Tennessee?

MR. CRAWFORD: In 1958. Yes, sir; it was with firemen. It was with the representatives of firemen, Brotherhood of Locomotive Firemen and Enginemen — at that location. It was a separate bargaining unit.

BY MR. CRAWFORD:

Q And were those men white men?

A They were white.

Q All right.

Now, in 1966, when the agreement went into effect, did the Missouri Pacific Railroad employ negroes in the class or craft of firemen at any other place within its system?

A They did.

Q And could you tell me where?

A At St. Louis, Missouri, at Little Rock, Arkansas, and on the seniority list district extending from Little Rock, Arkansas, down through Alexandria to Lake Charles, Louisiana.

(From Pages 722-727)

Q Is there a mandatory retirement age on the executive employees of the Missouri Pacific Railroad,

A There is; yes, sir.

Q Was there such in — on December the 31st of 1966?

MR. ROTH: Your Honor, may we have a continuing objection to all the testimony or evidence concerning mandatory retirement ages of anyone besides employees in the craft or firemen as was made with respect to our — to Defendant's Exhibit No. 13?

THE COURT: Yes.

BY MR. CRAWFORD:

Q Was this agreement in effect on December the 31st of 1966?

A Well, let me point this out with respect to the officers of the Railroad Company. It is not an agreement; it is a policy. And it was in effect on December —

Q (interrupting) What is —
A (continuing) — on December 31st, 1966.

Q On that date what was their policy with reference to their retirement?
A At age sixty-five.

And I might add, on — on January 1, 1967, the Director of Labor Relations, Mr. B. W. Smith, had to retire.

Q Now, Mr. Courtway, are there other differences between the agreements which exist that relate to firemen other than the difference in retirement age?
A Yes, sir; there are differences.

Q All right, can you explain some of those differences?
A In order to explain those differences, may I explain briefly why we have different agreements covering firemen over this — this particular system?

Q Yes, sir.
A The system was not constructed on one day. It evolved from a great number of different corporations or different railroad companies.

And in 1956, when through the reorganization of this railroad and the consolidation of all the various corporations, we found ourselves with approximately twenty-six different railroads or corporate entities. And on a great number of these the employment of people, or employment of all crafts and classes, were limited to that particular railroad.

And, as a consequence, labor agreements were negotiated and were confined to that particular railroad.

As of the — As of 1956, we found ourselves with about twenty-six separate unions on this Railroad. We had approximately ninety separate general committees or local or bargaining agents to see — to deal with. Of these there were approximately ten who represented firemen.

Of these ten, eight of them were of one union — the Brotherhood of Locomotive Firemen and Enginemen. And while they were of the same union, and belonged to the same union, the bargaining units were separate, because

of the historical fact that the agreements were confined to these particular railroads.

There were two others: the International Association of Railway Employees and the Brotherhood of Locomotive Engineers who also represented firemen.

So, through this, we find ourself today, even, with about eight or nine separate contracts covering firemen on this Railroad; and none of the contracts are identical nor do they contain the same provisions.

So all of the contracts, or the agreements, contain different ways to be paid, different manners to be paid; while the rates of pay are the same, the amount paid is different in each one of them, because of the various working rules, working conditions and matters of this kind.

Q All right.
So even if the men were — the men in one bargaining unit and the men in another bargaining unit were all members of the Brotherhood of Locomotive Firemen and Enginemen —or Enginemen and Firemen — which is it?
A Firemen and Enginemen.

Q — Firemen and Enginemen —
A Yes.

Q (continuing) — they still had agreements with the Company which had separate and different terms and conditions and provisions?
A They did.

Q All right.
Now, you explained to me an example of this that had to do with the work rules in taking off an engine. Would you explain that to the Court.
A Yes, sir.

The —

Under the agreement covering the firemen, on the former International Great Northern Railroad, which extended from Longview, Texas, to Houston, and also from Longview to Laredo, Texas, if an engine crew was required in the course of its trip to change the number of

diesel units that constituted a locomotive for that train, he would be paid one hour for changing that unit for another unit.

MR. JONES: If Your Honor please, we are going to be compelled to object. We now are getting into contracts. Now, those contracts would be the best evidence of their terms; and they are not a part of the Pre-Trial Order; and we object to any further reference to any contracts between this Railroad and any other set of employees, the contract being the best evidence.

MR. CRAWFORD: Your Honor, we are not seeking to prove the terms of the contract in order to support our — in order to support or deny the terms of those contracts. All we are seeking to demonstrate is that other differences exist because of collective bargaining, and to give examples of it. and in order to demonstrate the fact that there was a difference in this case — was not tied to racial discrimination but, rather, was due to collective bargaining.

THE COURT: I'm going to sustain the objection. However, you may make an offer of proof at this time.

MR. CRAWFORD: All right; thank you, sir.

(From Pages 731-733)

Q Now, after implementing the agreement between the Railroad and the International Association of Railway Employees which contained the terms of Award 282, and after implementing the sixty-five retirement contract, were there still more men on the seniority roster of Local No. 3 than there were jobs for them to perform?

A Yes, sir.

Q Do you recall how many?

A As I recall, there were approximately nine.

Q Now, were you —

A (interrupting) There were nine.

Q Excuse me?

A There were nine.

Q Will you describe what is meant, then, when you've got nine more men than you have jobs? How does this

situation —

A (interrupting) Well —
Q (continuing) — evolve?

A In working in the —

In the assignment of jobs, or people to jobs, on this particular seniority district, or any seniority district, by seniority or in seniority order, the men elect or select the jobs on which they desire to work.

Now, this is generally done through a seniority process. The older — the senior man will take the best job, and so on; or, at least, the senior man can take the job of his choice.

When all jobs have been assigned to them, we have a number of men left over who do not have regular assignments or who are not employed regularly. A number of these men will then constitute an extra pool, or, as we refer to it on the railroad, an extra board — because under all of our agreements with operating employees, they are permitted to absent themselves for vacation, for sickness, for other reasons — and when they do absent themselves, we need someone, then, to fill their position while they are gone or while they are absent from the job.

So, for this reason, we do carry a certain number of extra men.

Now, how often the extra men work depends on how many there are. So, men are regularly assigned what jobs we have. The other men are not regularly assigned to jobs. They have no jobs until called — until called on.

(Pages 734-741)

Q Now, Mr. Courtway, there has been discussion here with reference to promotion of firemen to the craft or class of engineer. Would you explain to the Court what is meant by a promotion rule?

A A promotion rule in — in an agreement with firemen pertains to the manner in which they will be selected or the method in which they will be selected. It also pertains to the consequences of any examination they might take and fail. It does provide for a progressive step —

progressive steps — in taking examinations to become qualified as an engineer.

Q Does the Missouri Pacific Railroad have in effect with other classes of firemen promotion rules, other than the International Association of Railway Employees?

A We do.

Q All right.

Now, do some or all of these promotion rules have a provision in there which might cause the employee to lose his position, or to have a reduced or limited position, with the Railroad?

A They do.

We have approximately —

We have six separate agreements relating to promotion of firemen on the various — with the various bargaining units of firemen over our system. Each contains some form of penalty or some measure in which they are penalized if they do not pass the examinations — or if they fail the examinations.

Q What procedures are set up for examinations?

A Normally —

Well, most of the agreements provide that there will be a series of three examinations. These examinations are devised and developed by the Railroad. It is a unilateral examination that we extend to firemen that they must pass in order to become qualified engineers.

There are a series of three examinations in this. In each series a man is provided the opportunity to pass the series; and, if he does not pass, he is given another chance. And if he does not pass that, he is given another chance.

In other words, in each series there will be three opportunities for a man to pass that phase of the examination.

When he passes that phase, he goes to the next phase. And from that he goes to the next phase.

Then he has passed the examinations for qualification.

There are other examinations that he must take in order to be considered for employment as an engineer.

Q All right.
And if the man fails to pass at any of these levels, after the three tries are given, then there is some restriction on his service?

A There is.

Q All right.
A On —

Under one agreement, if he fails the third time, he is removed from the seniority roster and dismissed from the service of the Company.

On another —

Under an agreement with another bargaining unit, if he fails the examination, he has a restriction placed upon him that he can only work as a yard fireman, or as a hostler or hostler's helper.

A hostler and a hostler's helper are from the ranks of firemen, and their duties are generally to handle engines around and about the enginehouse.

Other agreements —

There are other agreements that read that in the event of a failure by a fireman in any examination, he is placed — his seniority — his seniority date, or the date of his seniority, is taken away from him, and he is placed behind, or beneath, all the firemen who passed the examination — so that he is penalized by having men placed ahead of him on the seniority roster.

Q What is the practical effect on an employee who is at the head of the seniority roster for firemen who passes the test to become an engineer, Mr. Courtway?
A I'm —

Q (interrupting) All right —
A I —

Q All right; does that employee go to —
What position on the seniority roster of engineers does that employee go to?

A Provided he qualifies he enters the ranks of engineers, in accordance with an engineers' agreement, or the engineers' agreement, he then becomes the junior or the last engineer on an engineer's seniority roster.

Q Would this have any effect on the man's earning capacity for a period of time?

A It could very well have a great effect on his earning capacity.

Q Will you explain that?

A While he will work for a — an increased daily wage, the conditions under which he must earn this wage will be changed considerably. As the senior fireman, he has a choice of the best paying or the most desirable job in his seniority district. As the junior engineer, he has — he has no choice of a job. He must take what job is left after the engineers senior to him choose jobs.

And, generally, he is placed on the extra board so that he works as an engineer when he is needed to relieve senior engineers; and, as such, he is subject to leaving home — being called at all hours of the night. He has no regular assignment. He must depend on the needs of the service in order to work.

Q All right.

Now, do I understand that there is no promotion rule which has been agreed upon by collective bargaining between the Railroad and the International Association of Railway Employees concerning the men of Local No. 3?

A There is none.

Q All right.

Is there —

Pardon me, are you aware personally of an agreement — or may I say understanding as opposed to an agreement — between the Railroad and the International Association of Railway Employees with reference to promoting these men?

A Yes, sir.

Q Would you explain what that understanding was, Mr. Courtway?

A In — In January of 1967, we solicited from the fire-

men belonging to the International Association of Railway Employees an expression from them as to whether they desired to be considered for promotion and qualification as engineers. This was done in the form of a letter written to each one of them.

A number signified that they did desire —
MR. JONES: (interrupting) If Your Honor please, might we get this identified a little more accurately? Was this — this letter written after the members of Local No. 3 became members of the Brotherhood of Locomotive Firemen and Enginemen?

THE WITNESS: No, it was not.

I do not have the letter. It was, as I recall, written in — in January of 1967. Whether they were members of the Brotherhood of Locomotive Firemen and Enginemen, I do not know — because I had no way of knowing whether the individuals were members of the Brotherhood of Locomotive Firemen and Enginemen.

I do know that the International Association of Railway Employees was still the bargaining agent for the firemen under consideration.

BY MR. CRAWFORD:

Q Now, what was this letter?

A This letter was an — to — asking — or was a request to each fireman to inform us whether he desired to be considered for promotion and qualification as an engineer on his seniority list.

Q How was this letter distributed to the employees?

A I believe it was mailed as a certified letter to each employee.

Q Now, did this provision offering them the right to promote have with it any of the detrimental factors that you have discussed that the other agreements have?

A No, sir; it is — it did not.

Q If they failed to pass the tests to become qualified for engineer, was there any resulting effect?

A No, sir; there was not.

Q Would they remain at the head of the firemen's seniority roster in their district?

A They would retain their respective standings on the seniority roster.

(From Pages 777-779)

Q I might back up and ask it this way: Is there any white man on your railroad that's been working since 1917 who is not an engineer?

A Yes, sir.

Q Who?

A Do I have to furnish the name?

Q Well, in what — where is he?

A He is at Little Rock, Arkansas. He is at St. Louis, Missouri.

We have any number of firemen who retired at age seventy and as still firemen.

Q And have —

A (interrupting) They have retired at sixty-five voluntarily as firemen.

Q And have never been promoted to engineer?

A Have never been promoted to engineer.

Q All right, sir.

THE COURT: How does that compare with the number who have been promoted to — to engineer?

THE WITNESS: It's substantially less, Your Honor. It is as a result of the promotion agreements prior to — prior to 1953, if a man took the examination to become an engineer — or to become qualified as an engineer — and failed it, he became a fixture fireman; and, as a result, his entire service for this Company was as a fireman.

THE COURT: I see.

BY MR. JONES:

Q Well, then, maybe I didn't understand that. Let me ask for clarification.

The men you are talking about have been — who have been there that long, and still working as firemen, are men who could not pass the examination?

A Who did not pass the examination. Some refused the examination, I might add.

(From Pages 790-791)

Q I think it's obvious, Mr. Courtway, but just in order that it might be a matter of record, you have outlined here the duties of a fireman, which appear to be in some instances somewhat insignificant. Is that the reason why the railroads determined that there was no necessity for firemen on other than passenger service?

A That is correct.

Q Now, with reference to the men of this union — Local No. 3 — and with reference to whether or not they were ever promoted to the rank of engineer, or position of engineer, what would be necessary in order for them to become engineer or to take the test?

A An application to take the test, or a desire to take the test to become an engineer.

To become an engineer it would also necessitate an agreement with the engineers.

Q All right.

Was there any rule in effect between the Railroad and the existing union which prohibited these men from applying to take the test?

A No, sir.

Q Was there a matter of practice involved which denied them the right to take the test?

A The practice on the part of the employees; not on the part of the Railroad.

Q If they had requested the right to take the test, could they then have done so?

A Yes, sir.

Q Now, a few moments ago, I'm afraid that Mr. Jones got a little confused. Will you explain again whether or not the operations that these firemen performed while

they were in the yards, through which they ran, were the same type operations that were performed by the union in Memphis, Tennessee?

A Essentially the same; yes, sir. Yard service —

Q (interrupting))And in —

A (continuing) — throughout the system.

Q And in addition to that, they would perform the duties that were required for road service?

A That is correct.

(From Pages 794-797)

Q Now, sir, do you have personal knowledge of whether or not the Plaintiff in this case, Boyd Peters, was employed regularly immediately before the effective date of this Award 282?

(pause)

A Yes, sir.

Q All right, can you give me the facts with reference to whether or not he was employed regularly immediately before?

A He worked one day in January of 1964; he worked seven days in July of 1964; but he was not working on the effective date of this agreement.

Q Did the —

Was Mr. Peters given the opportunity to work in another division at this period of time?

A He was given the opportunity to work, and did work.

Q Where?

A He worked during June, July and August, 1964, at Little Rock, Arkansas.

Q All right.

A As a fireman.

Q Did he ever work at any other place in Arkansas?

A He worked at Van Buren, Arkansas.

Q All right.

Now, why was it that Mr. Peters was free to leave the

seniority district in which he was working and go to another district in order to work?

A I — I don't —

Q (interrupting) Let me — let me rephrase my question.

Was there a job for him to do in the Dequincy Division at the time that he went some place else to work?

A No, sir; he was not working.

Q All right.

A He was not working on the Dequincy Division.

Q All right.

Now, immediately after — immediately after the effective date of Award 282, did this have any effect on his working status?

A Yes, sir.

Q What was that effect?

A He returned and was employed, or was working on the Dequincy Division.

Q And did he work regularly in each month for the remainder of that year?

A Yes, he did.

Q Now, with reference to when a man is qualified — qualifies as an engineer and is able to shift back to fireman, as was discussed on cross-examination, if a man's services are needed as an engineer for a poor job — a job that is undesirable — and the man is also able at the same time to be employed in a good job as a fireman, does the man have a choice as to which job he will fill?

A He does not have a choice.

Q What does he have to do?

A He has to take the job as an engineer.

Q What would result if he did not?

A A loss of his seniority as an engineer.

Q Now, in order for a man to — in order for a person to have the right to flow back and forth between crafts or classes, is there an agreement necessary?

A Yes, there is.

Q By and between whom?

A There is — There is an agreement necessary with the firemen and also an agreement necessary with the engineers.

Q Is the Company a party to this agreement?

A They are a party to both agreements.

Appendix I

Excerpts from the testimony of M. G. Jackson on November 14, 1969 (From Pages 875-877)

In your division, sir, could you tell me how it is that firemen come to be promoted to the capacity of locomotive engineer?

A They meet certain qualifications. There is no protion rule as such on the Dequency Division. The engineers are hired on the Dequincy Division.

Q Are the men who were formerly represented by the International Association of Railway Employees capable or eligible for hiring as engineers?

A If they were certified as an engineer, they could be employed as an engineer.

Q Now, how would — how would you come to be certified as an engineer?

A By gaining experience as an engineer, and operating an engine, and qualifying, and passing certain examinations and tests.

Q Have the men who were firemen on the — who were formerly represented by the International Association of Railway Employees on this Division been advised of their right to be promoted to locomotive engineer if they qualified?

A Yes, sir.

Q And how was that done?

A By registered letter. We notified them all that if they desired to be engineers that they would pass these tests.

Q All right.
And when was this done? Do you recall, Mr. Jackson?
A In 1967, I believe. I would have to look at the file on that.

Q I hand you a piece of paper. See if this would refresh your recollection in any way.
REPORTER'S NOTE: Instrument handed to the witness. (pause)
A Yes, sir; January 23, 1967 — the letters were mailed to the firemen.

Q All right.
A Over my signature.

(From Pages 877-886)

BY MR. JONES:

Q When you wrote that letter, Mr. Jackson, how many responses did you get?
A I will have to refer to my file, if I may.

Q Please do.
REPORTER'S NOTE: The witness produced instruments. (pause)
A We got nineteen responses from the letters.

Q And have those men been given the tests?
A No, sir; they have not.

Q Have they been advised about how to go about taking it?
A Yes, sir; they were advised and furnished the necessary booklets to qualify for promotion.

Q Who — Who — Who were advised?
A The men.

Q All twenty-three of those men?
A I could not say whether all twenty-three of them were advised. The Road Foreman of the Engines contacted all of them.

Q Well, now, just a minute. Did you —
Do you know that they have — that they have been

advised about this, or is this what somebody else has told you?

A I have not advised them personally; no, sir.

Q So you have no correspondence reflecting that they have been advised, personally?

A I have correspondence that they were mailed registered letters, as indicated in the letter of the 23rd —

Q (interrupting) I'm talking about after that. Have you got any letter in your file subsequent to this letter to these men?

A Our files reflect that the — reflect the dates that they answered this letter that we mailed to them.

Q In other words, your file reflects the date of the letter that they responded to this letter of January the 23rd, 1967?

A Yes, sir; and the date that we gave them the progressive examination booklets.

Q All right.

Now, show me where your file reflects that, Mr. Jackson.

REPORTER'S NOTE: Instrument handed to Counsel for the Plaintiffs.

A I'll have to point that out to you.

(pause)

THE COURT: (to witness) You can step down and —

MR. JONES: (interrupting) I can come around.

THE WITNESS: That's all right.

MR. JONES: I thought I would read it before —

THE WITNESS: Here (indicating).

BY MR. JONES:

Q On these dates here (indicating)?

REPORTER'S NOTE: Instrument had been displayed before the witness.

A Yes, sir.

THE COURT: All right, you may resume the witness stand.

REPORTER'S NOTE: The witness had momentarily withdrew from the witness stand for the last series of ques-

tions and answers; resuming his seat once again on the witness stand in compliance with the Court's direction.

BY MR. JONES:

Q So you sent books out on various dates as are reflected by this instrument, say, from May the 3rd of '67 — well, let's just say in April or May of '67?

A I believe that's correct.

REPORTER'S NOTE: Instrument then handed to the witness.

A (continuing) Yes, sir.

Q Now, since that date did you schedule any examinations?

A No, sir; these —

Q (interrupting) Have you done anything else that —

A (interrupting) These booklets were to be completed and returned. To date one booklet has been returned.

Q What do you mean "completed and returned"?

A The progressive examination books are questions and answers. The questions are prepared, and the answers are to be written in by applicants for engineer.

Q Do you — Do you happen to have one of those booklets with you?

A No, sir; I don't.

Q But one has been returned?

A Yes, sir.

THE COURT: Do you recall the name of the employee who returned it?

THE WITNESS: Yes, sir; H. L. Redmond (spelling) R-E-D-M-O-N-D.

BY MR. JONES:

Q And do I take it that that book is some kind of test?

A It's an examination and test; yes, sir.

Q Did he pass or fail?

A I don't know his — I haven't seen his score on that.

Q Has he been promoted?

A No, sir. No, sir.

Q Mr. Jackson, the matter which brings us all here is the retirement — the compulsory sixty-five retirement agreement executed by the Company and the Union back in June of 1964. You are familiar with that agreement, are you not?

A Yes, sir.

Q When did you first learn of opposition to that agreement?

A In '66 when the first — when the first employees were retired under that agreement.

MR. JONES: That's all we have, Your Honor. Pass the witness.

REDIRECT EXAMINATION

BY MR. CRAWFORD:

Q Mr. Jackson, This promotion examination that I believe you said Mr. Redmond had completed. Is that the only step which is required in order to be promoted?

A No.

No; upon completion of the writing of the book, it is referred to, the progressive examination booklet, an air brake instruction car — A car that is equipped similar to and which operates like an engine and train, is moved around to various locations on the Railroad where men who are ready to be promoted — and who have completed the booklets — are then examined by an air brake instructor, who then certifies that they are qualified as an engineer.

Q All right.

Now, has Mr. Redmond completed this portion of the qualifications necessary?

A No. The air brake instruction car has not been in — on the Dequincy Division since his completion of the book.

Q Is he in line to undertake this particular part of it when it does come?

A Yes, sir.

Q Is there any reason why he will not be accorded that right?

A Oh, no; no, sir.

Q Now, once these men receive the booklets and the information which are supplied by the Company as reflected by your file there, is there anything necessary for the Company to do after that time in order to enable these men to step towards promotion if they so desire?

A Other than answering the questions—any questions which might arise in their writing of this book. We will attempt to answer their questions and help them in the answers of the questions.

Q All right.
Then they take the booklets, and they fill them out and return them back to you?

A Yes, sir.

Q And until they have been returned back to you, and until they have received a passing score on that, they have not completed the first step in qualifications for an engineer?

A That is the first step; to complete the progressive examination booklet.

Q All right.
Now, how many tests — or how many progressive examination books must they write?

A Only one.

Q Only one?

A Uh-huh. It's in three phases — three steps — but it's all contained in one book.

Q All right.
Now, will you explain that; please sir? There are three phases. Over what period of time are these three phases written?

A This book is commonly referred to as the three-year examination book — progressive examination book.

Normally after a fireman has worked a certain number of years, he is given the book. He fills it out — the first year portion of it — and he returns it. That's graded — checked. And then he's returned the book. And if he makes a passing score on the first year progressive, it is then

returned where he goes to work then on his second year.

After completion of that, he turns it in. Again, if he has passed it, then the third year is returned to him and he completes it. And then, if there are passing scores on all three, then he is eligible then to attend the air brake instruction course.

Q All right.
And how many opportunities does a man have on each of the three steps?

A They have been afforded several opportunities. And there is no agreement on the promotion of firemen on the Dequincy Division, but they have on other divisions — and I believe it's three opportunities to finish — to complete this progressive examination.

Q All right.
But — But these people — have any of them — do you know whether they have been accorded the opportunity to take more than one — more than three shots at passing any one of the three steps?

A These — the Dequincy Division firemen?

Q Yes.

A No; there haven't been any books turned in except the one book.

Q All right; none of them have been turned in for the first step —

A (interrupting) No.

Q (continuing) — Except the one?

A Just the one.

Q Do you recall approximately how long ago it was that that book was turned in?

A No. It's been within recent weeks. I have not even had the book passed to me yet. It's not been graded and passed to me. Just recently.

Q Could you give an estimate as to how many weeks?

A Within the past four or five weeks, I believe, Mr. Crawford.

Appendix J

Excerpts from the testimony of John W. Whitaker on November 14, 1969.
(From Pages 891-892)

Q Would you state your name; please, sir?
A John W. Whitaker.

Q Mr. Whitaker, where do you live?
A 1701 South Jefferson Street, Albany, Georgia.

Q And by whom are you employed?
A The Central Georgia Railway. It's part of the Southern Railway System.

Q What is your position on that railroad?
A I'm employed as a fireman and locomotive engineer.

Q All right.
Have you ever been an employee of the Missouri Pacific System?

A No, sir.

Q Do you have a capacity with a labor organization?
A Yes, sir.

Q Which one?
A The International Association of Railway Employees.

Q And what is your capacity with them?
A President.

Q How long have you been President of the International Association of Railway Employees, Mr. Whitaker?
A Since 1950.

Q All right.
And subsequent to that were you a member of that organization?

A Yes, sir.

Q For how long?
A I came out of the service in 1946.

Q How long have you been an employee of the railroads?

A Since 1933.

(From Pages 893-905)

Q Now, Mr. Whitaker, is — does your union have a history, of your own personal knowledge, of being involved in litigation with reference to the defense of the rights of the black man?

A Definitely. That's why we are in business.

Q Will you outline briefly what that history is, please, sir?

A All right.

Q And any other Court cases that have arisen out of it.

MR. JONES: Your Honor — If Your Honor, please, for the sake of brevity and time, if nothing else, we would object to the materiality of this Union's litigations in other areas as not being relevant and material to any —

MR. CRAWFORD: (interrupting) Your Honor, we submit that it is relevant and material, because we submit that the Plaintiffs have taken, and will continue to take, the position that this man has not represented these men as they should save been represented. And we feel that the history of this man, particularly to demonstrate in the past — and currently — his activities and efforts to represent his — the members of his union definitely have a bearing on the position which they have taken in this case.

MR. JONES: Well, that would be subject to — if the Court please — to the objection that prior conduct is not relevant to a specific question. It would be like trying to prove that the engineer that ran over somebody at a crossing had had a wreck previous to that time — or hadn't had. Either way it would be irrelevant.

The relevancy is the specific instance; not a question of custom or habit, reputation — matters of that kind.

THE COURT: Overrule the objection.

BY MR. CRAWFORD:

Q You may —

A (interrupting) Well, this organization was formed

in 1934 solely because negroes were not admitted to membership in the Big Five Brotherhoods, which was solely white. And we have been in court from 1940 up through the middle 1950's defending the negroes' rights and privileges, such as the Steel and . . . case, Rolax versus . . . — the Palmer case — versus Southern . . .

REPORTER'S NOTE: These citations above given were not clearly audible to the Court Reporter.

A (continuing). All of those cases were defending negro firemen's rights. And, in fact, we had been styled as a little N.A.A.C.P., to tell you the truth, because that was our sole purpose for existence.

The Palmer case was solely designed to — designed to take — to protect the negroes' rights by not being eliminated from the railroad through this promotion angle where they — they — that forced them to pass a promotion examination — and that they would be fired if they didn't pass it.

We are in court presently on the Illinois Central for upgrading train quarters (porters).

Q Is that under the Civil Rights Act?

A Under the 1964 Civil Rights Act — Title 7.

Q All right.

A We are in court now in Louisiana, on the Louisiana & Arkansas, to force the negro brakemen to promotion as conductors. That's in court in Shreveport now.

Q Who made the decision about the filing of these lawsuits?

A Well, I recommended them to the Executive Board, and they endorsed it.

Q All right.
Now, go ahead.

A Particularly on this line, we have — we had cases where they built the . . . yards in Houston —

COURT REPORTER: (interrupting) I'm sorry, but —

THE COURT: (interrupting) I'm sorry; I didn't hear that. Particularly on the what?

A (continuing) — on the Beaumont, Sour Lake and Western — Gulf Coast Line — a case in which the men who are here before you now — when they built the new ... yards at Houston, they were not permitted to go out in there as employees; and, of course, we went to the Adjustment Board to defend their privilege to work in that yard.

Q Now, why were they not — why were they not permitted to do so?

A,Because the Brotherhood of Locomotive Firemen and Enginemen represented firemen, and they were giving it to the firemen that the Brotherhood of Locomotive Firemen and Enginemen had who were employees at the Houston Belt Terminal.

And we went before the National Railroad Adjustment Board and we got a — we didn't get a favorable decision there because all the members of that Board were either from the railroad or unions combined. We had no representation there which balanced the composition of that Board. We weren't financially able — in fact, that's been our position all along; we had no economic strength to force these railroads to do anything.

The white unions were hostile towards us, so we — we just had to more or less beg, and plead and accept what we could get.

If we strike, the white unions were not going to respect our picket lines.

Q All right.

Now, you have — you have mentioned a case which has specifically to do with the promotion rule. Will you explain the position — your position as President of the International Association of Railway Employees with reference to the promotion rule?

A Well, the standard promotion rule, or what we consider standard, is what prevails with other organizations — and that has a provision in there that a man will be called to take a promotion in line with his seniority. If he refused to take it, or fails to pass it — his promotion examination — he is dismissed from the service.

In one of our conventions they voted that we should try to upgrade our men, and we served notice on the railroads that we wanted our members promoted, and particularly here on the Gulf Coast Line.

The carriers agreed to promote them, but they wanted to put this standard rule in effect where he would lose his job if he didn't pass this examination.

But we couldn't agree to that because we felt that the majority of them could not pass it. Therefore, we didn't ever push the issue, but we left it open where they could volunteer to apply for this if they wanted to.

Q All right.

Was there an understanding between yourself and the Missouri Pacific Railroad that the men on the Dequincy Division, represented by your Union, could voluntarily apply for promotion?

A Yes, sir.

Q And receive the booklets necessary?

A Yes, sir.

Q And if they passed, be promoted to fireman — or engineer?

A Yes, sir.

Q Do you know when this occcrred?

A Well, the first conference we had on it was in the early part of June, 1964. And the next conference we had on it was in July of 1964.

Q All right.

Now, with reference to the — to the court case that was held with regard to this question, will you explain briefly the position that was taken in that case by the Brotherhood and by your Union, Mr. Whitaker?

A Well, I will have to precede it with a little explanation: that the Brotherhood made an agreement with the Railroad that all men that were not in line for promotion — that the men that were in line for promotion would be given fifty-one percent of all jobs in passenger trains, through freights, local freights and yard service. That's what we went to court on — to — they considered the

white man as being promotable and the negroes as not. So we went into Court to break up this Southeastern Carriers Conference agreement. That is what it was known as. This percentage rule, or this promotion rule.

While we were in court, the Judge asked them, "Well, why don't you promote the negroes?"

Well, that must have given them an idea, or something, because they immediately came back, realizing the fact that they had a clause in this agreement that could fire him if he didn't pass — and I would say that ninety percent of our negro firemens could not have passed this examination — and thus would have been eliminated.

So, we had to go back in court to stop them from promoting.

If we had allowed them to —

The spirit and intent of the promotion was not in good faith, and rather than just stand by and just see them force these men to — to take promotions and lose their jobs if they didn't take the examination —

I don't know if the Court is familiar with this or not, but we had coal burning, shovel fired engines that required strong backs and weak minds — and these men were not hired for intelligence purposes. They were hired to shovel that coal and to fire this engine; and, therefore, they were not of the intellectual type; they were either mostly totally illiterate, or simi-literate.

So, therefore, we couldn't —

And we fought that thing and finally broke it up — under the Palmer case.

Q All right.
Now, that is the Palmer case you are referring to?
A Yes, sir.

Q All right.
A Versus the Southern Railroad.
And there were four companion cases, which was Eugene Carter (phonetic), on the Atlantic Coast Line, Adam Wright versus Seaboard (phonetic), and — and we had

one other case against the Louisiana and Arkansas — . . . versus Louisiana and Arkansas.

Q All right.

Now —

So, in your opinion, sir, as the representative of the — as the National President of the International Association of Railway Employees, would it have been to the benefit of your members for there to have been a promotion rule on the Dequincy Division of the Missouri Pacific?

A No, sir. No, sir; it would have been detrimental to the men.

Q All right.

Now, as the matter stands now, are the men accorded the opportunity to be employed as engineers without suffering the detrimental effects of the standard promotion rule?

A Yes, sir.

After researching our records, we found that this permanent injunction we had against the Brotherhood of Locomotive Firemen and Enginemen gives them the privilege to volunteer to take the promotion examination, and it restricts the carrier from dismissing them in the event that they fail to pass it.

Q All right.

THE COURT: Now, what was the date of this decision that you are referring to?

THE WITNESS: It was approximately in 1952. We had a — We had an out-of-court settlement. Well, it was — it was actually under the supervision of the Court, but it was a settlement between our organization and the Brotherhood of Locomotive Firemen and Enginemen.

BY MR. CRAWFORD:

Q And then was the opinion written in accordance with that —

A (interrupting) Yes, sir.

Q (continuing) — settlement?

A Yes, sir.

Q Do you know whether or not that case is — is a District Court case or an Appellate Court case?

A It was before the —

It finally went before the Fourth Circuit, but it came back down to the District Court at Richmond, Virginia, I believe it was.

Q Now, do you recall, sir, the first time that the discussion came up between the Missouri Pacific and the International Association of Railway Employees with reference to retirement at the age of sixty-five?

A Well, yes, sir; it came as a result of my letter to the carrier back in 1958.

Q All right.

And why did you write that letter?

A Well, we had an abundance of men on our roster. In fact, this is the reason that we went into this seventy-year agreement in the very beginning — because —

THE COURT: (interrupting) What kind of agreement?

A (continuing) — the compulsory retirement at seventy years of age.

THE COURT: I see.

A (continuing) That was the original —

We had an abundance of men, and all of the — we had a lot of old men that were commanding these jobs that could have made a livelihood by being on their pensions. We had a bunch of young men that — that had exhausted their unemployment benefits and they just were not working — period.

BY MR. CRAWFORD:

Q Now, excuse me. Let me interrupt.

Why were they not working? What — What was there that kept them from being able to work, Mr. Whitaker? business.

A Well, there was not enough trains; not enough business.

In fact, when the diesel engine came on, they were converting from steam engines to diesel engines; the diesel was pulling more cars with fewer trains.

Q All right.

Now, what was it that decided who would work and who wouldn't?

A Seniority.

Well, the older men, naturally, could demand the jobs — and they did. So this was actually a make-way move. Here were some men here that could draw a pension and earn a living through retirement. Here were some men here that had exhausted their unemployment and they couldn't.

So, we were just trying to make some jobs for them. That's the — That's the theory behind the whole thing; was to create work.

(From Pages 912-915)

Q Now, when the — when the age sixty-five agreement was approached again in 1964, do you remember the circumstances that surrounded the — that surrounded the discussions that were had with reference to that agreement?

A You mean with management?

Q Yes.

A Well; yes, sir.

We had been —

As I said, we had been talking about this thing since 1958, and we had gotten closer and closer together on it. So, when this Award 282 was handed down, the Missouri Pacific Railroad was not going to get any relief at all under this, because all of their employees had more than ten years — and we still had more employees than we had jobs to provide for them.

Q Even after the men were cut off that were — that were —

A (interrupting) Even after the seventeen were cut off, it still didn't give them the relief that 282 was giving other railroads.

So, we were in a position to bargain with them then. That was the first time we ever had something they wanted, and we were in a position to bargain.

So — I don't know how to put it unless we go back further.

These men, although we had gotten all the increases — all the fringe benefits that the Brotherhood of Locomotive Firemen and Enginemen had gotten — there was still a difference in the wages, because of from where they started off.

In other words, we started off — back there when they first organized — if we got an increase — if we got a ten cents an hour increase — if they got a ten cent an hour increase, then we got a ten cent an hour increase. But that never brought our salaries up to line because we didn't start off in line.

Q All right.
Now, when — when was the starting time? How far back in history?
A Oh, back in the twenties, I assume.
But, we took —
This organization took over in 1944. But, it was back beyond that. But we only have a record of from 1944 on.

Q All right.
A So —

Q (interrupting) Excuse me. Let me just ask this question. Was this before the Missouri Pacific took over these three roads — these three railroads involved?
A Oh, yes, sir; they were — they were separate carriers back then.

Q All right.
A So, now we said, "All right, you want some relief under — so you can take advantage of Award 282 — we want an additional increase in pay that will bring our salaries up to the others."

So, we did. And we tentatively at that point agreed on what would — what would bring our — these firemen's wages up to the prevailing rates with other firemen.

(From Pages 918-919)

Q All right.

Now, you — you have made a statement which I think needs some clarification, and I'm not sure I understand it well enough to ask the question; but you say the carrier — the Defendant in this case — wanted the age sixty-five retirement in order that they might take advantage of the relief that they had under Award 282?

A Yes, sir.

Q Now, what relief did they have under Award 282 which the age sixty-five agreement would enable them to take advantage of?

A They could run some jobs without firemen on them. In other words, 282 — Award 282 said that the Company would be forced to keep firemen on ten percent of the jobs; therefore, there was another ninety percent that they could run without firemen, provided that all them that was working that had more than ten years of service — it protected the employees with ten years service — but the Missouri Pacific — the Gulf Coast District was in such a condition that they had an abundance of firemen and may have had them for several years to come.

Q All right.

Did Award 282 give the carrier the right to blank jobs if there were not — if there were not protected men to fill those jobs?

A Yes, sir.

Q And is this the relief that they were seeking?

A Right.

Q And that they got under Award 282?

A Yes, sir.

Q So that if men were retired, or if they left the service for other reasons, or were removed from service for a legitimate reason, then the — the carrier could leave that job open and didn't have to fill it with a man?

A That's correct.

Q So the carrier's object, then, was to eliminate the men from the seniority rosters so that they could blank jobs?

A Yes, sir.

(From Pages 933-935)

Q Now, I believe you said a little earlier that the general convention of your union voted to upgrade your men by seeking promotion rules. Is that correct?

A Yes, sir.

Q Did you find out that there was some — some of the members of the union who did not feel this way — who did not care for promotion rules?

A That is correct.

Q For what reason?

A Well, they — they had been on the job for a long time before it came available to them, and they had gotten good positions as firemen. If they had taken promotion to engineer at this late date, and then they were going to go back to the foot of the engineers' roster and be the same as a new man coming up; and then he would be working extra jobs — or less desirable jobs as he would as a firemen because he had greater seniority.

So, generally, they decided to pass it up. Those that thought they could pass it, decided to pass it up.

Q Do you know, sir, whether or not any of the men formerly represented by the International Association of Railway Employees and members of Local No. 3 have taken the steps necessary to become promoted to firemen — pardon me — to engineers?

A Yes, sir.

Well, several of them took the literature and began to study for it; but the one that has progressed the furthest — or the two that — Redmond is one of the firemen. I don't recall his initials, but Redmond has progressed; and I think he's just about ready to take his student trip in actually running the engine.

(From Pages 939-940)

Q All right.

Now, after the age sixty-five agreement was entered into, and after the implementing of the agreement which contained the terms of Award 282, were there still men on the seniority roster of this Local No. 3 who had no jobs?

A Still men —
Still had an abundance of men who couldn't work.

Q And were these men that your union represented?
A Yes, sir.

Q And was your — was one of your duties to seek to find ways to put these men to work?
A Yes, sir.

Q And was the age sixty-five agreement one of the ways that you used in order to find work for more men?
A That is correct.

(From Pages 957-959)

BY MR. JONES:

Q Well, the net effect of it — of what they got you to do, then, was — was to give them something — to give them the sixty-five agreement in exchange for benefits to your men that five days later Congress said they had to give them anyway. Isn't that true?

A No, sir; I would have to make a statement to set the record straight.

I did not negotiate this agreement. This agreement was negotiated by Charley Stewart, the President of the local, and Herman Simpson. They only mailed it to me for my signature.

I didn't even go into the conference.

Q It was a bad deal, whoever made it?
A Well, no. No; we wouldn't have signed it if we thought it was a bad deal.

Q If you had known that the consideration you were giving for it was a consideration that you were getting for it was yours anyway, it would have been a bad deal; wouldn't it?

A No. No; we've still got to get these men on the extra board up to regular paying jobs; and the only way we are going to do it is retire the older men.
This thing was obvious — the way we were going. The sixty-five year agreement was going to help the younger

men by moving the older men where the younger men could work and make a living.

Q Now, do you know it to be a fact, that after 282 and before the effective date of this sixty-five agreement — the '64 compulsory retirement agreement — before it went into effect — in other words, it was agreed to in '64 to be effective in '66 —?

A Right.

Q Do you know, or don't you know, for a fact that Boyd Peter and N. J. Emanuel had regular work?

A I don't know whether they did or not, because Boyd Peters went off on another railroad.

Q That was before 282?

A No.

No; he was working up in Van Buren, Arkansas, or somewhere up in there, after 282.

Q What about Emanuel?

A I don't know. He may — He may have been regularly employed.

(From Pages 963-964)

Even if the Civil Rights — Even if we had gotten all these other benefits under the 1964 Civil Rights Act, we still needed this sixty-five year agreement to move these men up into some jobs.

I'll tell you, it was as much to our benefit to have this sixty-five years —

COURT REPORTER: (interrupting) I'm sorry. Would you repeat that last statement?

A (repeating) It wasn't for our benefit to have this sixty-five agreement; it was for the men's benefit.

The only reason we ever went to the compulsory retirement agreement to start with was because we had to move somebody out to bring these men up to the regular jobs. It was for their benefit.

These men asked for this seventy-year compulsory retirement agreement. They asked for it. They — They —

You see, we were over in Court in Georgia fighting this seventy-year compulsory retirement agreement in this ... case. So, we couldn't see how we could very well come on down here and put it in effect when we were opposed to the Brotherhood of Locomotive Firemen and Enginemen putting it in effect over there where they were eliminating the negroes.

But, they prevailed with us.

In fact, the General Chairman at that time, ... Allen, was pretty close to seventy; so he wasn't about to put anything into effect that was going to make him retire.

These men —

That's why Homer Simpson got the job as General Chairman, because these men elected Simpson — younger man — so he could put this seventy-year compulsory retirement agreement in effect.

And it did. It retired the older men at seventy. Some more of these younger men moved up.

Then the next younger group got the idea, "Well, we could move them out. We could put it to sixty-five and we can get up to work some."

It was all of their own makings — from the seventy-year on down.

(From Page 983)

Q Now, what does the constitution or the by-laws — what do they provide with relation to the execution of contracts between the Union and the employer?

Q They give it solely to me. It's — as President and Field Organizer.. Of the — All of it is entrusted to me. And when the General Chairman feels that he needs a contract, I'm supposed to go to — go there with them and work it out with the company.

I don't know. We have a peculiar situation. Whether you know it or not, our — our men were — well, they weren't totally illiterate, but they were more semi-illiterate, we will have to des — we will have to say. And they still — It still comes back to a few that could read and

write had to assist those that couldn't. That's the general idea.

(From Pages 987-989)

Q (interrupting) Well, if that's so, then, do you know why the railway brotherhoods would have insisted on this seventy-year provision whereas you were contending for the sixty-five?

A Well, you see, they were after the engineers.

You see, a white man was not firing when he got sixty-five or seventy. He was over there as an engineer..

So the engineers would have to put a seventy-year compulsory rule in to get rid of him.

After he had been there ten or fifteen years, he was over — he was no longer a fireman; he was over — he was over there as an engineer. And in some instances where he didn't qualify, or didn't make engineer, he was still sitting there — they didn't (did) put in the sixty-five — they had some before we did.
(pause)

Q Now, as I understand it, there has never been in this seniority district that's in issue here — that we are concerned with here — there has never been any kind of a promotion plan for the negro firemen?

A No, sir; it's only been discussed.

Q They have, ah, been given the opportunity to obtain

A (interrupting) Yes, sir.

Q (continuing) — a position as engineer; but there is still no promotion plan as such?

A No, sir.

Q And I believe you say that the reason that you didn't want this promotion plan is because of this very feature that you are referring to — that if they took a test, or were forced to take a test, that they would be discharged?

A That's correct.

Q If they were unable to pass it?

A Yes, sir.

Q Is that right?

A Yes, sir.

Q Well, now, could you have negotiated for some kind of a plan which would have not included this feature of being automatically fired in the event that the person failed to pass the test?

A We tried, but they wouldn't agree to it.

You see, "You take this other rule or we won't take one."

Q You couldn't obtain any such agreement like that from the Union — I mean, from the Railroad, then?

A No, sir.

Q You did negotiate for that?

A We discussed it in conferences as a result of our proposals. But they assured us that "We won't provide a rule unless you put a standard rule in."

Q Well, now, the Railroad has made an exception in the case of letting them — making them eligible now to just simply obtain the job as an —

A (interrupting) Yes, sir.

Q (continuing) — as an engineer?

A Yes, sir.

Q But they were unwilling to negotiate a rule with you whereby the man could take the examination without being fired under a promotion plan?

A Not back at that time.

You see, we haven't been on that problem within the last few years. It's been several years since then. The Brotherhood of Locomotive Firemen and Enginemen has taken that over now.

Appendix K

Excerpts from the testimony of Plaintiff Nicholas Emanuel on September 15, 1970.
(From Pages 1019-1020)

Q Mr. Emanuel, when you were working on the railroad and were on the seniority roster there in DeQuincy, do you recall what number you were on the roster?

A Let's see —.

MR. ROTH: Your Honor, I might say that is a matter that has been stipulated to previously. It is contained in the stipulations.

MR. CRAWFORD: I'm not trying to get it from the facts, Your Honor, but just to lead into something.

THE COURT: Perhaps you can tell me from the stipulations what his seniority number was.

MR. ROTH: It was either 29 or 30.

THE WITNESS: I think it was around 30 — 30.

BY MR. CRAWFORD:

Q While you were working there, Mr. Emanuel, what job were you performing?

A Locomotive fireman.

Q Did you have a special run that you were usually on, a job that you — or a trip that you customarily took?

A No, sir, not at the time. I was working off the Extra Board.

Appendix L

Excerpts from the testimony of Plaintiff Boyd Peters on September 15, 1970.
(From Pages 1098-1100)

Q At the time of your retirement in 1967 what was your job? What trip were you working for on the railroad?

A I was working between Houston and DeQuincy on through freight.

Q How long had you been working that job?

A Oh, off and on. I didn't do it regular, I mean off and on for about six or seven months or more, all the time. Sometimes I would go somewheres else and work.

Q Why would you go some place else and work?

A Well, I was on the Extra Board. When they called me to go to New Iberia or Baton Rouge on the switch engine, I would have to go.

Q At the time of your retirement in January '67 were you on the Extra Board?

A I was on the Extra Board.

Q And occasionally you would catch the Houston-DeQuincy through freight?

A Right.

Q But at other times you would catch whatever jobs were available?

A Right.

Q Whenever they didn't have a man to fill a job when the job came up because somebody had taken off, or somebody was sick, or something like that, you would work it. Is that right?

A That's right.

Q So you weren't working the Houston to DeQuincy job on a regular basis, but just as you would catch it on the Extra Board?

A Well, at that time I was working regular, because I was catching lots of vacancies —.

THE COURT: What is it? At that time you were what?

THE WITNESS: Regular, because I was catching lots of vacancies on that division.

Q Well, perhaps I don't understand enough about railroad talk to explain myself, Mr. Peters. Forgive me. When you were working it, you say you were picking it up regular, but were you doing so off of the Extra Board?

A That's right.

Q As opposed to having received it because you bid on the job yourself?

A That's right.

THE COURT: Which was it?

THE WITNESS: I didn't bid on it. They called me. Be four or five men laying off, see, and they called me for the job.

Q All right.

A Didn't have no mens (sic) on the Extra Board. Just

me and one man was the only one that was on the Extra Board.

Appendix M

Excerpts from the testimony of Carl C. Wiggins on September 16, 1970.
(From Page 1123)

Q And you say the situation presently is you have nineteen firemen?

A Nineteen firemen and about twenty-three jobs and no Extra Board.

Q What is happening to those other jobs, these other three or four jobs each day that you don't have firemen to fill?

A They are being blanked.

Q And by being blanked you mean the job is there, but there is simply no one to fill it?

A No one to fill it.

Q Who is working your job since you are here today?

A No one.

Q — to testify?

A No one working my job.

(From Pages 1128-1129)

Q All right. Now then, insofar as whether or not these jobs are being left or are going without people working them, as Local Chairman I'm sure you're familiar that this was the spirit and intent of the Award 282, the International arbitration award with reference to firemen?

A That is correct, signed by the committee.

Q Now, with reference to the men on the Extra Board, Mr. Wiggins, the men who were there, and specifically we would be speaking about Mr. Emanuel, Mr. Peters and Mr. Jones, during the year 1966, would that not be true?

A Yes, they were on the Extra Board at that time, I believe. In 1966 I believe they were.

Q Yes, that's the period of time I am talking about. Now, those people would have work to do because of the

persons above them who would lay off, because of their personal desires or because of their personal health. Is that true?

A That's right.

Q But they would not have the same earning capacity, so to speak, because of the fact they were on the Extra Board, as someone whose seniority would allow them to bid for and receive a regular job?

A That is right.

(From Pages 1133-1134)

Q Who works these jobs? Where do the firemen come from to fill these jobs when the regular fireman is taking his vacation?

A Those jobs are being blanked now.

Q Well, in the years 1967, '68, '69 would those jobs have been worked by men off the Extra Board?

A Yes.

Q If you had had an Extra Board?

A That is correct.

MR. ROTH: That's all the questions we have, Your Honor.

THE COURT: Is there anything further?

RECROSS-EXAMINATION

BY MR. CRAWFORD:

Q Mr. Wiggins, do you recall the year that the passenger trains went out of service?

A They have been off about two years, I think.

Q Would it have been sometime —?

A Maybe less time than that.

Q Would the year 1967 be approximately correct?

A I just don't remember when they pulled them off. They pulled off the day job first, and then they pulled off the night job later on. I don't recall just what date it was.

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-277

MISSOURI PACIFIC RAILROAD COMPANY,
Petitioner,

vs.

BOYD PETERS, ET AL.,
Respondents.

BRIEF OPPOSING WRIT OF CERTIORARI

JONES, JONES & BALDWIN
P. O. Drawer 1249
Marshall, Texas 75670
Attorneys for Respondents

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

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BRIEF OPPOSING WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

STATEMENT

The assertion of Petitioner that the Court of Appeals has held that the Civil Rights Act, ". . . makes agreements by Negroes unenforceable" (Pet. 1) finds no support in the opinion or proceedings below. To the contrary, the central issue, as stated in the opinion below (A. 19, p. 3) was whether the Petitioner had discriminated against the Respondents by forcing their retirement solely because of their race, in violation of 42 U.S.C.A., §2000e-2(a). The meaning of the Appeals Court opinion is that the perpetuation of an existing racial discrimination by an employer-bargaining unit contract is in violation of the Act, and resulting damages to employees are recoverable. On oral

argument, counsel properly answered the inquiry (Pet. 1) whether there was any way that this discriminatory agreement could have been made so as to be valid in the negative.

As summarized in the opinion below (A. 26), the Trial Judge found that the employer-union agreement resulted from previous discriminatory hiring policies, adversely affected the Respondents' status as employees and discriminated against them on the basis of race by carrying forward into the present and future effects of prior racial or discriminatory employment practices. Obviously, the entering into and enforcing of such a retirement agreement was in violation of 42 U.S.C.A., §2000e-2(a), and the Court so found.

It may shorten the work of the Court if Respondents briefly answer the contentions of Petitioner as set out in its

QUESTIONS PRESENTED

1. The right of freedom of contract is not impaired by a refusal to enforce a racially discriminatory agreement that violates Title VII of the 1964 Civil Rights Act, irrespective of whether the agreement was made by whites or blacks.

2.A. If a contract is in violation of Title VII of the Civil Rights Act, it matters not that it conforms with the Railway Labor Act, or was entered into in good faith by the employer. The opinion below (A. 30-33) fully answers this question.

B. If Petitioner has pointed any "opposite effects" in the discriminatory working agreement, we have failed

to find them in a careful reading of the entire Petition. Nevertheless, the action for damages by the Respondents for discrimination against them could not be affected by supposed benefits to them or others arising out of the same agreement.

C. As found by the Trial Court (A. 26) the agreement sought to perpetuate prior racially discriminatory employment practices of Petitioner, and was not based solely on the fact that white firemen had a prescribed retirement age of seventy (70), and black firemen an age of sixty-five (65) although this alone would suffice to establish racial discrimination.

D. The "promotion rule" offered the black firemen was rejected because it would have required automatic discharge of the firemen who failed to pass a test for promotion (R. 988), whereas the promotion rule for white firemen permitted them to flow back and forth from the rank of engineer to the rank of fireman (R. 775-776), and rather than being automatically discharged upon failing an examination, they were permitted to become "fixture firemen" and remain in the service of the company (R. 778). The tendered "promotion rule" was itself racially discriminatory.

3. The "unique arrangement" that permitted black firemen to remain in service as firemen without penalty was designed to prevent them from achieving promotion to engineer status, which they were offered only on pain of being automatically discharged if they failed the promotion test (R. 988). The unique arrangement worked well, for there had never been a black engineer on the Petitioner's system (R. 759).

Continuing our form of presentation, we next reply to the Petitioner's

REASONS FOR GRANTING THE WRIT

1. By the agreement the Petitioner sought to perpetuate prior racially discriminatory employment practices.

The pre-Act discrimination for which Respondents sought no relief (A. 68-69) was that arising out of pay and employment benefits and discrimination prior to the Act. The gravamen of the Respondents' complaint was against the agreement for carrying forward into the present and future discriminatory practices which affected the Respondents' right to work. We believe, as found by the Courts below, that the agreement operated to "freeze" the status quo of prior discriminatory employment practices that were forbidden in *Griggs* v. *Duke Power Company*, 401 U. S. 424, 28 L. Ed. 2d 158.

We take issue with the concluding remarks of Petitioner under this point questioning the Court of Appeals statement that the black retirees were no less competent for firemen's jobs than their white counterparts. The Defendant's witness Courtway testified that black and white firemen had frequently worked the same train and substituted for one another, even running overlapping routes (R. 757-758).

2. The Petitioner wholly failed to meet its burden of showing the discrimination to be job-related or a business necessity.

The racial impact of the employer-union contract having been shown and found by the Court, the burden of showing that the agreement was related to business necessity

or job performance was upon Petitioner.[1] The Petitioner contends that there was no need for firemen in freight service, and that a business necessity to retain only firemen who were capable of being promoted to engineers brought about the agreement that forced the black Respondents to retire five years earlier than the white firemen. The basis of the contention is not unlike that advanced by the white brotherhood in *Rolax* v. *Atlantic Coastline R. Co.* (4th Cir. 1951), 186 F. 2d 473. In that case the brotherhood procured a contract providing that only "promotable" men would be employed as firemen. Since no Negro firemen could be given an opportunity to stand examination for promotion to engineer, this effectively barred them from employment. The Court properly held that it is idle to attempt to justify such discrimination on grounds of operating efficiency.

When it is remembered that the Petitioner made the subject black firemen incapable of being promoted by offering a racially discriminatory promotion rule (supra, page 3), its efforts to justify the discrimination found in the agreement as a business necessity parallel those of the brotherhood in *Rolax*. It would indeed defeat the purposes of Title VII of the Civil Rights Act to permit a carrier to penalize its employees for refusing to accept a racially discriminatory system of promotion by thereafter contending that because the employees were not promotable, a business necessity existed for racial discrimination against them.

The distinction between the black and white firemen could not have been job-related (see testimony of Courtway referenced page 4, supra).

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1. *Griggs* v. *Duke Power Company*, 401 U. S. 424, 431, 432, 28 L. Ed. 2d 158, 164-165. *Moody* v. *Albemarle Paper Co.* (4th Cir. 1973), 474 F. 2d 134, 138; *United States* v. *Jacksonville Terminal Co.* (5th Cir. 1971), 451 F. 2d 418, 455-457.

3. The bargaining agency for the Respondents and the Petitioner could not enter a working agreement in violation of Title VII of the Civil Rights Act, nor are the civil rights of Respondents invaded by giving them relief from the invalid contract.

It is difficult to follow the argument of the Petitioner under its third reason for granting the writ. Its concern for maintaining the right of freedom of contract for blacks under the 1866 Civil Rights Act is touching, but we will be hornswoggled if we can see how it remotely applies to the conduct of the Petitioner in procuring the discriminatory contract in this case.

The right of freedom of contract on the part of blacks was valiantly defended by the Petitioner in its earlier dealings with the all black International Association of Railway Employees. Petitioner gallantly carried out contracts by the Association which caused Negro firemen to receive a lower rate of pay than white firemen, to receive less fringe benefits or welfare benefits than the whites, etc. (R. 615-616). This freedom of contract on the part of Negroes, whereby they were grossly discriminated against in favor of whites were kept in effect by Petitioner until an integrated union became the bargaining agency for the Negro firemen (R. 613-614).

In conclusion, it may not be amiss to point out that many of the members of the I.A.R.E. did not consider that their general chairman was properly exercising their "right of freedom of contract" when he said he was going to sign the agreement whether they wanted it or not (R. 481). The opposition to the chairman's action became hostile and angry (R. 482), and Mr. Simpson was gotten rid of because there would have been trouble otherwise (R. 483). While Respondents did not attack the authority

of Simpson to execute the contract, the background presented does shed light on the contentions of the Petitioner under this point.

CONCLUSION

The Petition having failed to show special and important reasons for granting the Writ, we respectfully urge that it be denied in all things.

Respectfully submitted,

JONES, JONES & BALDWIN
P. O. Drawer 1249
Marshall, Texas
By: /s/ FRANKLIN JONES
Attorneys for Respondents

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief Opposing Writ of Certiorari, was this the ..... day of ....., placed in the United States Mail, addressed to Mr. James Pope Simpson, 1507 Pacific Avenue, Room 900, Dallas, Texas 75201, Attorney of Record for Petitioner, Missouri Pacific Railroad Company.

/s/ FRANKLIN JONES
Of Counsel